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Measuring the Racial Unevenness of Law School

Jonathan Feingold* & Doug Souza**

INTRODUCTION

Consider the following hypothetical. Two law students recently completed their first year at a prestigious American law school.

The first student, Anne, is a single mother of two young children, Erin and Max. Anne receives several loans that cover the majority of her law school fees, but must also work part-time to cover living expenses for herself and her children. As a single parent, Anne is solely responsible for raising and caring for Erin and Max. Anne completed her first year of law school with a B+ grade point average (GPA).

The second student, Dan, is one year out of college and has no children. Dan's parents have had successful careers and, fortunately for Dan, they have been prudent with their money. Dan's parents were able to pay his college tuition and over half of his law school fees. He has taken out a few loans that cover the balance and provide more than enough for his living expenses. Dan completed his first year of law school with a B+ GPA.

Now, imagine you oversee hiring at a prominent law firm. With one position left to fill, you receive applications from Anne and Dan. You must determine who will make the more talented attorney. Although a serious assessment may demand a deeper review, all you know about each student are their respective GPAs and general circumstances as described in the preceding paragraphs.

Though imperfect for many reasons,¹ law school GPA frequently serves as a proxy for legal talent; a tool to differentiate between students.² Utilizing

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GPA in this way relies on the assumption that a similar GPA should communicate the same thing for each student. Based on this assumption, Anne and Dan's respective GPAs would suggest that the students, at least in terms of legal talent, are quite similar. However, Anne's route to a B+ was filled with obstacles that Dan never faced. Beyond studying and preparing for final exams, a baseline task common to all students, Anne divided her time between caring for her children and working a part-time job. Dan, in contrast, faced only the baseline task.

Due to this imbalance, Anne's B+ is arguably more impressive than Dan's. In other words, Dan was unable to out-perform Anne even with this advantage. Looking to GPA in the abstract clearly is not enough. To account for this difference, proper reliance on GPA may require departing from an acontextual lens for one that recognizes the students' distinct circumstances. Since adding this layer of context should facilitate an employer's ability to accurately identify the more talented attorney, refining our reliance on GPA should ultimately promote meritocracy.³

This hypothetical presents an example of unevenness. Unevenness refers to benefits and burdens that have nothing to do with an individual's inherent ability, talent, or hustle. Rather, unevenness describes the presence of particular burdens that uniquely tax certain individuals in a given setting; other members of the community do not face these burdens. Above, Anne's unique financial

1. Relying on standardized testing and grades as a proxy for academic ability has spurred various critiques. One area of critique cites growing findings that, as a result of stereotype threat, standardized tests systematically underestimate the academic ability of Black and Latino students. See Brief of Experimental Psychologists et al. as Amici Curiae Supporting Respondents, *Fisher v. University of Texas* (August 13, 2012) (No. 01-1015); Jonathan Feingold, *Racing Towards Colorblindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 231 (2012); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action'*, 94 CALIF. L. REV. 1063 (2006) [hereinafter Kang, *Fair Measures*]; Gregory Walton et al., *Affirmative Meritocracy*, SOC. ISS. POL. REV. (In Press) (estimating that given particular threat conditions, stereotype threat causes the under-measure of academic ability); Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132, 1137 (2009) (observing that as a result of stereotype threat, "the SAT Math and SAT Reading tests underestimate the intellectual ability of African and Hispanic Americans . . . by a total of 39-40 points," which is significant considering the "Black-White and Hispanic-White gaps on the SAT (combining math and reading) are 199 and 148 points, respectively"). For alternative critiques of standardized testing, see, e.g., *What's Wrong with Standardized Tests*, FAIRTEST (May 22, 2012, 9:26 PM), <http://www.fairtest.org/facts/whatwron.htm>.

2. Beyond GPA, many employers will consider membership in law journals and participation on mock trial, moot court, or other extracurricular organizations and activities. As a result of her circumstances, it is likely that Anne has less time to participate in such endeavors. Dan, on the other hand, may be able to develop a resume full of such extracurriculars because he has no responsibilities beyond his personal performance in law school.

3. Cf. Kang & Banaji, *Fair Measures*, *supra* note 1 (discussing the potential for tie-breakers to promote race-neutrality and reduce racial discrimination in the presence of implicit bias).

and familial responsibilities produced a particular unevenness. In a different context, unevenness would exist if one Olympic sprinter was forced to wear weighted clothing yet the other racers remained free to run in lightweight synthetic.⁴ The weighted clothing, by uniquely burdening the sprinter, creates the unevenness. A tie between the sprinter and another runner conceptually parallels the tie between Anne and Dan. Just as that tiebreaker would fall in Anne's favor, accounting for the weighted clothing suggests that the sprinter is actually the faster runner.

In this Article, we focus on *racial* unevenness and examine the common manifestations of racial unevenness in American law schools. Racial unevenness, which we introduce in Part I, refers to the presence of particular burdens that affect an individual solely because of her race. These burdens, which most often arise because an individual falls outside of the racial norm,⁵ manifest across a spectrum. At one end lie obvious forms of overt and invidious racial discrimination. At the other end, racial unevenness arises from environmental factors and institutional culture independent from any identifiable perpetrator. As we detail below, race-dependent burdens can arise in institutions and communities that expressly promote racial diversity and condemn overt racial discrimination; good intentions are no panacea to racial unevenness.⁶

Part II analyzes manifestations of racial unevenness common to American law schools.⁷ Beyond law school's baseline challenges,⁸ Students of Color must

4. Others have employed a track metaphor, in which a participant's race, gender and socio-economic status correspond to a particular lane and its associated challenges. See AAPF's *Track Metaphor—The Unequal Opportunity Race*, AFRICAN AMERICAN POLICY FORUM (Oct. 31, 2012), http://aapf.org/tool_to_speak_out/track-metaphor-aminated-film/. Alternatively, imagine a sporting event in which only one player has to deal with a vociferous heckler. The heckler burdens one member of the group only, which creates the unevenness. As a policy matter, unevenness may not inherently necessitate an intervention. We are not arguing that stadiums should prohibit fans from yelling at athletes. However, we do believe that intervention is appropriate in law school when unevenness results from an individual characteristic such as race, gender or sexual orientation. These are not the factors that should determine law school's winners and losers.

5. By "racial norm," we refer to the racial group in a particular context that functions as the baseline from which difference is measured. Racial demographics and broader social and cultural elements interact to determine which race occupies this baseline position in a given situation. In the American context, whiteness remains the baseline; Whites remain numerical majorities in most spaces and racial difference is measured in terms of distance from whiteness. Due to this White baseline, racial unevenness in the United States most commonly burdens People of Color. Whites rarely bear the weight of this unevenness.

6. See *infra* Part I.B.ii (describing the multiple causes and manifestations of racial unevenness that are not the product of intentional discrimination).

7. For the majority of this Article, we break students into two groups: Students of Color and White students. There are multiple legitimate concerns with such a framing. Grouping Students of Color obscures the degree of difference and heterogeneity that exists across groups and leaves even less room to appreciate the differences within a single racial category. Writing in White versus non-White terms also risks perpetuating a White-centrist frame that reproduces White as a non-racial and exclusive category. Although we recognize these concerns, we chose to

also contend with racial unevenness and its associated burdens. These burdens can produce intersecting harms and headwinds that span from emotional and mental anguish to academic underperformance.⁹ Because whiteness remains the baseline in nearly every major American law school,¹⁰ White students do not face these challenges.¹¹ In the zero sum game of law school,¹² racial unevenness effectively privileges White students. However, with the wind at their backs, White students often fail to recognize this advantage.¹³

Part III concludes with a detailed analysis of the Diversity Action Committee Survey on Diversity and Classroom Climate (DAC Survey), which law students administered at UCLA School of Law in the spring of 2012. The DAC Survey constitutes one of the first attempts to measure racial unevenness in law school. Relying on quantitative and qualitative metrics,¹⁴ the DAC Survey contributes to prior research that has measured racial unevenness in

disaggregate students in this manner to facilitate analyzing the DAC survey and, since White remains the baseline in the American racial regime, difference in law school is most often measured off of whiteness.

8. All students must deal with the normal challenges of law school, which include, *inter alia*, learning how to read an appellate opinion, dissect and understand a fact pattern, and fluently speak a new “legal” language.

9. See, e.g., Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 62 (2000) (discussing the harms associated with racially hostile environments, including psychological and mental anguish and feelings of stigmatization and marginalization); Derald Wing Sue et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOL. 271, 271 (2007) (discussing harms associated with racial microaggressions); Walton & Spencer, *supra* note 1 (discussing how stereotype threat, which is likely to arise in racially hostile environments, hinders Students of Color from demonstrating their true talent).

10. This results in part from the racial composition of law school student bodies, faculties and administrations.

11. See generally Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 L. & SOC. INQUIRY 711 (2004) (discussing racial unevenness’s impact on academic outcomes in law school).

12. Most law schools evaluate students on a curve. A curve prescribes that student’s grades, arguably the most determinant component of a law student’s dossier, are determined by the quality of that student’s work relative to all other students.

13. See generally Tim Wise, *Whites Swim in Racial Preference*, ALTERNET (Feb. 20, 2003), <http://academic.udayton.edu/race/04needs/affirm20.htm>.

14. This focus on racial unevenness should not be misunderstood as a claim that other dimensions of marginalization in law school (whether arising from axes of identity such as gender, sexual orientation, socioeconomic status, age, or religion) are unimportant or less important than that arising from race. For the DAC Survey’s first administration, we chose to focus on race. Recognizing the limitations of any survey, we welcome and encourage further research that adds to this report. For scholarship that has addressed other dimensions of unevenness in law school, see, e.g., Kimberlé Crenshaw, *Towards a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1989); Angela Mae Kupenda, *On Teaching Constitutional Law When My Race Is in Their Face*, 21 LAW & INEQ. 215 (2003) (discussing the racial and gender unevenness faced by female faculty of color); Brad Sears, *Queer L*, NAT’L L.J. SEXUAL ORIENTATION 234 (1995) (discussing the experience of law school as a gay, White male).

undergraduate institutions,¹⁵ and gender unevenness at one elite law school.¹⁶ Among other findings, the survey reveals that UCLA Law's Students of Color face disproportionate levels of discrimination and marginalization when compared to their White counterparts. Whereas Students of Color cite race as central to their experience, White students overwhelmingly view race as a non-factor in their legal education.

Before proceeding, we briefly quote from the *Yale Law Women Speak Up Report*, which is part of an ongoing effort to better understand the impact of gender dynamics at Yale Law School.¹⁷ The *Report's* authors offer the following thoughts:

In our adversarial legal system, evidence is marshaled to win arguments and close cases. Speak Up and its thick record of quantitative and qualitative data are intended to do something different. We share this report with you to invigorate a conversation, not end it. We believe this is the best way to honor the hard work of our predecessors and move toward a satisfying future for everyone in our community. In that spirit of openness, we invite you to read, to reflect, and of course, to speak up.¹⁸

We present this Article and the DAC Survey in the same spirit. The DAC Survey is not the end of any conversation. It is only the beginning. If we are lucky, it will be the beginning of a long, ambitious and robust conversation about racial unevenness and corresponding interventions at UCLA Law and beyond.

I. RACIAL UNEVENNESS AND ITS CONSEQUENCES

A. Racial Unevenness – A Basic Definition

For most Americans, “racism” remains a loaded term. The word has the power to invoke powerful images of segregated schools, men in white hoods, burning crosses and the many other manifestations of overt and invidious racial discrimination that have plagued America. Due largely to changing national norms and anti-discrimination legislation,¹⁹ however, overt discrimination has

15. See generally Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation*, RESPONDING TO THE REALITIES OF RACE ON CAMPUS: NEW DIRECTIONS FOR STUDENT SERVICES (S. R. Harper & L. D. Patton, eds. 2007) (discussing fifteen years of research on racially hostile learning environments on undergraduate campuses).

16. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) (observing how gender influenced the experience of students at University of Pennsylvania Law School).

17. Preface, YALE LAW WOMEN, YALE LAW SCHOOL FACULTY & STUDENTS SPEAK UP ABOUT GENDER: TEN YEARS LATER (2012).

18. *Id.*

19. E.g., Civil Rights Act of 1964, Pub. L. No 88-352, 78 Stat. 241 (1964) (codified as 42 U.S.C. ch. 21 (2006)).

greatly declined.²⁰ Notwithstanding this decline in overt discrimination, subtle forms of discriminatory treatment²¹ and environmental forces independent from conduct continue to exact unique burdens upon People of Color because of their race.²² But since these burdens are not the product of overt discrimination, unburdened individuals rarely recognize their presence and associated harm.²³

Counterintuitively, these new forms of covert racism are potentially more insidious than their overt predecessors.²⁴ Their “invisible” nature coupled with our traditional understanding of racism creates challenges for those who attempt to capture and analyze these modern race-dependent harms.²⁵ Confronting this challenge, scholars have developed concepts such as racial microaggressions and racial climate to describe and expose the “subtle, nebulous, and unnamed nature” of modern racism and the way in which environmental forces affect “the educational experiences and outcomes of Students of Color.”²⁶ Others, situated primarily within the tradition of Critical Race Theory, continue to interrogate the way in which implicit biases,²⁷

20. Even in the absence of overt and intentional discrimination, if we define discrimination as occurring anytime a perceiver treats a target in a particular way because of the target’s race, there remains strong evidence that discriminatory treatment continues to exist. See Kang, *Fair Measures*, *supra* note 1; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) [hereinafter Kang, *Trojan Horses*].

21. See Sue et al., *supra* note 9, at 271 (“[R]acism (a) is more likely than ever to be disguised and covert and (b) has evolved from the ‘old fashioned’ form, in which overt racial hatred and bigotry consciously and publicly displayed, to a more ambiguous and nebulous form that is more difficult to identify and acknowledge.”).

22. See *infra* Part I.B.ii.3 (discussing the impact of stereotype threat and other burdens that arise from environmental factors). As early as 1974, psychologist Chester Pierce implored that “one must not look for the gross and obvious. The subtle, cumulative miniassault is the substance of today’s racism.” Chester M. Pierce, *Psychiatric Problems of the Black Minority*, in AMER. HANDBOOK OF PSYCHIATRY 516 (S. Arieti ed. 1974).

23. This invisibility should not necessarily surprise us. President Clinton’s Race Advisory Board concluded that, *inter alia*, many White Americans remain unaware of the privilege they enjoy in America and how their behavior discriminates against People of Color. See JOHN HOPE FRANKLIN ET AL., PRESIDENT’S INITIATIVE ON RACE, ONE AMERICA IN THE 21ST CENTURY (1998), available at <http://clinton2.nara.gov/Initiatives/OneAmerica/PIR.pdf>.

24. See, e.g., Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1752 (1989) (“[A]lthough the overt forms of racial domination described thus far were enormously destructive, covert color bars have been, in a certain sense, even more insidious. After all, judgments based on expressly racist criteria make no pretences about evaluating the merit of the individual’s work. Far more cruel are racially prejudiced judgments that are rationalized in terms of meritocratic standards.”); Solórzano, *supra* note 9, at 60–73; Derald Wing Sue, *OVERCOMING OUR RACISM: THE JOURNEY TO LIBERATION* (2003) (“The ‘new’ manifestation of racism has been likened to carbon monoxide, invisible, but potentially lethal.”).

25. Scholars have noted that “[w]ithout an adequate classification or understanding of the dynamics of subtle racism, it will remain invisible and potentially harmful to the well-being, self-esteem, and standard of living of people of color.” Sue et al., *supra* note 9, at 272.

26. *Id.*; Solórzano, *supra* note 9, at 16.

27. See generally Kang, *Fair Measures*, *supra* note 1; Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010) [hereinafter Kang, *Are Ideal Litigators White?*].

institutional and societal forces²⁸ and identity,²⁹ among other things, perpetuate racial oppression in the America. Joining this work, we introduce racial unevenness as a concept that will help us understand and unveil how race remains embedded in our institutions and our daily lives.

At a basic level, racial unevenness refers to the presence of any burden that arises solely because of a person's race. Had this person belonged to a different race, she would not have confronted this burden. Relevant burdens range from the most overt racism to the far more difficult to identify, subtle and seemingly mundane harms unattributable to any perpetrator.³⁰ Since only some members within a community bear the weight of racial unevenness, it functions as a racial tax.³¹ In American society, People of Color most often bear this tax;³² it is a tax Whites almost never have to pay.

When discussing racial unevenness, we employ “raced” and “race-normed” to differentiate between the individuals that do and do not bear the burden of unevenness in a given setting. The notion of “racing” is derived from Jerry Kang’s model of racial mechanics.³³ Under Kang’s model, race is the product of a series of processes. The first step consists of an encounter involving a perceiver and a target; the perceiver relies on a set of mapping rules and racial schemas to map the target into a particular racial category.³⁴ Schemas, which guide this mapping, are mental “templates of knowledge that help us organize specific examples into broader categories.”³⁵ For instance, at a young age we learn to recognize “something with a seat, back, and legs . . . as a chair.”³⁶ Without expending valuable mental resources, we simply sit down.³⁷

28. See, e.g., Devon M. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado, *Working Identity*]; Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709 (1993).

29. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (introducing the concept of intersectionality); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

30. Such moments and the ensuing negative consequences can result from good intentions. See Cecil J. Hunt, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FL. ST. U. L. REV. 721, 771–72 (1996) (describing a faculty member's decision not to call on Students of Color because of the students' perceived vulnerability).

31. Cf. Claude M. Steele, *Expert Report*, UNIVERSITY OF MICHIGAN (Jan. 15, 2011), <http://www.vpcomm.umich.edu/admissions/legal/expert/steele.html> (“[Stereotype-threatened students] pay an extra tax on their investment there, a ‘pioneer tax,’ if you will, of worry and vigilance that their futures will be compromised by the ways society perceives and treats their group. And it is paid everyday, in every stereotype-relevant situation.”).

32. *Id.*

33. See Kang, *Trojan Horses*, *supra* note 20, at 1500.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; see also Kang, *Are Ideal Litigators White?*, *supra* note 27, at 888 (2010).

Such processes enable us to constantly digest large quantities of information without expending too many cognitive resources.³⁸

Schemas apply to most things we encounter in our lives, such as other human beings. As with a chair, a set of mapping rules helps us subconsciously identify and categorize people. Instead of cuing on a seat, back, and legs, placement in racial categories depends on characteristics such as phenotype, accent, or skin color.³⁹ Once mapped into a particular racial category, presence in that category triggers an associated racial meaning.⁴⁰ Racial meanings can take the form of stereotypes or attitudes.⁴¹ A stereotype involves particular traits that we associate with a racial group, such as foreign, criminal, or good at math.⁴² An attitude involves an evaluative feeling about a group, such as like, dislike, fear, or admiration.⁴³ While related, attitudes and stereotypes are distinct. For instance, a person may hold positive stereotypes about Asians and math but simultaneously hold a negative attitude about the racial group. The particular racial meaning ultimately affects the perceiver's behavior vis-à-vis the target.

By describing only some individuals as raced, we depart slightly from this model. As described above, due to racial schemas, all people are mapped into a particular racial group, which then triggers associated racial meaning. We contrast "raced" with "race-normed" to emphasize that the burdens associated with racial unevenness most often arise as a result of an individual's distance from the racial norm. In situations where whiteness is the norm, White individuals are still mapped (or raced) into a racial category. However, there is no burden associated with this mapping because it occurs with respect to a White baseline (i.e. White is normal). It is as if the White individual has no race, a phenomenon often referred to as white transparency.⁴⁴ For this reason, we refer to Whites in such contexts as race-normed. By contrast, the moment someone is mapped into a non-White racial group, that distance from the racial norm has the potential to create an incipient burden, or unevenness. A Person of Color is thereby raced.

Whiteness is not inherently the racial baseline. Depending on context, racial unevenness sometimes manifests in a way that burdens Whites. For instance, within a college class on Asian Studies, with an Asian-American professor and a majority of Asian-American students, Asians may be race-

38. See Kang, *Trojan Horses*, *supra* note 20.

39. *Id.* at 1500.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See, e.g., Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993); Wise, *supra* note 13.

normed and non-Asians may be raced.⁴⁵ The NBA, where blackness is arguably the norm, provides another example. In such a space, a White or Asian basketball player is vulnerable to race-dependent challenges that his Black teammates may never face. One recent example is Jeremy Lin, who became the fourth Asian-American to play in the NBA 2010.⁴⁶ The media thoroughly commented on the race-dependent burdens Lin faced during his tenure with the New York Knicks in 2012.⁴⁷

Racial unevenness and its effect on students is complicated by the often complex and multifaceted nature of identity. Beyond race, unevenness arises as a result of characteristics such as gender, sexual orientation and socio-economic status. An individual's identity in any of these social categories could create particular burdens unrelated to her inherent talent or abilities. Due to the intersectional nature of our identities, many of us may simultaneously fall within and outside of the norm. Constant across each domain, the particular form of unevenness results from distance from the norm, whether it is male, straight or middle-class. Ultimately, any unevenness proceeds with the same logic: Assuming all other characteristics are equal, difference along a particular axis will privilege one and burden another.

45. Claude Steele provides a similar example of a White student in an African-American political science class. Within this particular space, where blackness was arguably the baseline as a result of the overwhelming majority of Black students and the substance of the curriculum, the White student acutely felt the weight and presence of his race in a way that did not occur in other classrooms. See CLAUDE STEELE, *WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US* 85–89 (2010) [hereinafter STEELE, *WHISTLING VIVALDI*]. In either example, societal stereotypes about Asian or Black students could still penetrate the interior of the classroom and impact behavior and perceptions. Still, the presence of a large majority of Asian-American or Black students and an explicitly Asian-centric or African-American-centric curriculum would likely be sufficient to shift the default racial norm away from its White baseline.

46. See, e.g., Asian American – Sports – Basketball, WIKIPEDIA, http://en.wikipedia.org/wiki/Asian_American (last visited March 3, 2013); Devin Gordon, *The Jeremy Lin Debate No One Wants to Have*, GQ.COM (July 19, 2012), <http://www.gq.com/blogs/the-q/2012/07/the-jeremy-lin-debate-no-one-wants-to-have.html>; Devin Gordon, *Jeremy Lin, Carmelo Anthony and Race: An Alternate Viewpoint*, GQ.COM (July 20, 2012), <http://www.gq.com/blogs/the-q/2012/07/jeremy-lin-carmelo-anthony-and-race-an-alternate-viewpoint.html>; Jay Caspian Kang, *A Question of Identity: The headline, the tweet, and the unfair significance of Jeremy Lin*, GRANTLAND (Feb. 22, 2012), http://www.grantland.com/story/_/id/7601157/the-headline-tweet-unfair-significance-jeremy-lin.

47. Some may argue that if racial unevenness compels a racial remedy (i.e. affirmative action) in certain contexts, then intellectual consistency demands that we support race-consciousness “admissions” in the NBA (or hypothetically in a mathematics doctoral program where Asian students outnumber Whites). Although racial unevenness may burden Whites to a certain degree in these settings, the situations are not parallel. For instance, whereas People of Color faced explicitly discriminatory policies that formally limited their ability to access institutions such as the NBA and higher education, Whites have rarely faced formal or informal exclusion in the United States. This distinction, among others, cautions against assuming that the presence of racial unevenness in itself is sufficient to warrant intervention.

B. Racial Unevenness – A Taxonomy

All manifestations of racial unevenness exist at a particular point within two, at times overlapping, spheres. The first sphere comprises all forms of racial unevenness that arise when an individual is treated differently by another person, group, or institution because of her race. The second sphere, in contrast, encompasses manifestations of racial unevenness that arise from environmental factors and institutional culture in the absence of disparate treatment.

This disaggregation of racial unevenness maps closely onto established models of discrimination that distinguish between disparate treatment and disparate impact.⁴⁸ Under these traditional models, disparate treatment exists anytime a perpetrator treats a victim differently because of the victim's race.⁴⁹ The unlawful harm is the perpetrator's discriminatory behavior, which is motivated by invidious, as opposed to rational, non-racist grounds.⁵⁰ Disparate impact, in contrast, exists whenever there is a disparate racial outcome.⁵¹ The harm is the disparity itself, unrelated to the presence or absence of an identifiable perpetrator.⁵²

Though similar, our formulation of racial unevenness diverges slightly from these past models. Formally, the disparate treatment sphere of racial unevenness is identical to that described above. However, by including behavior that results from implicit bias (e.g. "unintentional" discriminatory treatment), our disparate treatment sphere extends beyond traditional articulations of disparate treatment that demand evidence of an "intentional" act.

Racial unevenness's second sphere encompasses a space that is simultaneously broader and narrower than traditional articulations of disparate

48. Disparate treatment theory formally entered the Supreme Court's equal protection jurisprudence in *Washington v. Davis*, 426 U.S. 229 (1976) (holding that cognizable equal protection claims required a showing of discriminatory intent even in the presence of profound disparate impact). Prior to *Davis*, the Supreme Court had recognized cognizable Title VII claims of discrimination in the absence of discriminatory intent. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.") (emphasis omitted).

49. Alan Freeman has described this conception of discrimination as the "perpetrator perspective" because of the prerequisite existence of an identifiable perpetrator. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29 (Kimberlé Crenshaw et al. eds., 1995).

50. See Laurence H. Tribe, *Making Sense of the Equal Protection Clause: A Right Not to Be Subjugated*, AM. CONST. L. 1514, 1515 (2d ed. 1988).

51. Disparate impact theory has alternatively been described as the "anti-subjugation theory" and "victim perspective." Although all slightly nuanced, each model of discrimination focuses on the victim's experience and recognizes race-based harm in the absence of an identifiable perpetrator.

52. See *Griggs*, 401 U.S. at 432.

impact. It is broader because race-dependent burdens can exist even in the absence of racially disparate outcomes. Students of Color, for instance, could be just as successful as their White counterparts even in the presence of race-dependent burdens. The second sphere is simultaneously narrower because the presence of a racially disparate outcome does not guarantee the presence of racial unevenness. This mismatch arises because racial unevenness, as we have defined it, refers to race-dependent burdens at the individual level.⁵³ Even if no such burdens exist, a disparate outcome could conceivably arise. Still, in most instances individual experiences will track group outcomes. Disparate outcomes therefore provide relevant evidence of race-dependent burdens, and thus racial unevenness. By focusing on the burden at the level of the individual, as opposed to its cause or group-wide effect, the second sphere maps more closely onto a “victim”⁵⁴ or “anti-subordination”⁵⁵ perspective, both of which conceive of discrimination in terms of harm suffered.

1. *Disparate Treatment: Intentional and Unintentional Discrimination*

As described above, racial unevenness’s first sphere encompasses burdens that arise from disparate treatment by another person, group, or institution. Disparate treatment arises in various ways, spanning interpersonal interactions to institutional policies or practices. Although we often understand discrimination in terms of negative treatment, racial unevenness exists even if the race-dependent treatment is positive. This “boost,” by privileging some individuals over others because of their race, creates a race-dependent burden.⁵⁶

And since racial unevenness refers to race-dependent harm, disparate treatment is problematic regardless of the perpetrator’s underlying intent; racial unevenness exists whether or not it is the product of intentional and invidious, or unintentional and subconscious, behavior. To differentiate between these forms of disparate treatment, we focus on whether explicit or implicit bias caused the underlying discriminatory act.

Explicit and implicit biases arise from social cognitions.⁵⁷ A cognition is a thought or feeling, and “a social cognition is a thought or feeling about a person or a social group, such as a racial group.”⁵⁸ In our daily lives, most social cognitions are implicit, which means they subconsciously and instantaneously enter our minds.⁵⁹ Cognitions are the product of racial schemas. As discussed

53. This is not to say that racial unevenness does not also operate at the group level. For purposes of this Article, however, we narrow our lens to manifestations of racial unevenness at the level of the individual.

54. See Freeman, *supra* note 49.

55. See Tribe, *supra* note 50, at 1515.

56. See Kang, *Trojan Horses*, *supra* note 20.

57. See *id.* at 887; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) [hereinafter Kang, *Implicit Bias*].

58. Kang, *Trojan Horses*, *supra* note 20.

59. *Id.*

above, racial schemas allow us to quickly process large amounts of information by organizing particular things or people into broader categories.⁶⁰ As a result of racial schemas and implicit cognitions, we automatically place individuals into racial categories that trigger associated attitudes and stereotypes.⁶¹

“Explicit” connotes that the cognition is “consciously accessible through introspection *and* endorsed as appropriate by the person who possesses” it.⁶² Salient examples of behavior arising from explicit bias include Jim Crow laws, Japanese Internment, racially motivated hate crimes, racially restrictive housing covenants, and voter gerrymandering.⁶³ In each instance, the decision maker (perceiver) is consciously treating one group differently than another because of race. Most often, the perceiver endorses the stereotype or attitude driving the decision. Historically, models of human behavior presumed that our attitudes and stereotypes about racial groups were the product of these explicit biases.⁶⁴

Implicit biases, in contrast, comprise attitudes and stereotypes that are inaccessible through self-inspection.⁶⁵ The perceiver, who may not endorse the stereotype or attitude if made aware of its existence, is often unaware of, or mistaken about, the source of the bias and its influence on behavior.⁶⁶ We may honestly believe that we view a particular group positively without realizing that we implicitly hold negative attitudes or stereotypes about that same group.⁶⁷ Since implicit biases can directly impact behavior, however, narrow

60. *Id.*

61. *Id.*

62. See Kang, *Implicit Bias*, *supra* note 57, at 1129.

63. We categorize these examples as the product of explicit bias because the relevant decisions makers would be able to identify the racially inflected motivations driving their behavior. In upholding the curfew and exclusion of Japanese Americans, for instance, the Court never claimed an absence of intentional discrimination. Rather, the Court consistently differentiated between presumptively unconstitutional racial antagonism (understood as pure, irrational racial hostility) and a more lawful “common sense” racial profiling. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (“To cast this case into the outlines of racial prejudice, without reference to the real military dangers which were presented merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . .”).

64. See Kang, *Implicit Bias*, *supra* note 57, at 1129.

65. See *id.* at 1129–31.

66. See Kang, *Are Ideal Litigators White?*, *supra* note 37, at 887.

67. See *id.*; cf. Jonathan Feingold & Karen Lorang, *Trayvon Martin and Implicit Bias*, 59 UCLA L. REV. DISC. 210 (2012) (discussing how we may be unaware of our own biases, yet such biases can still impact our behavior).

conceptions of disparate treatment that account for intentional discrimination only fail to embody the entire breadth of race-dependent treatment.⁶⁸

2. *Institutional Culture and Perceiver Effects*

Racial unevenness's second sphere, which we generally refer to as institutional culture, comprises all race-dependent burdens that are not a consequence of disparate treatment. These forms of racial unevenness can arise from personal interactions, but are also commonly the product of environmental factors. Since environmental factors will change across settings, racial unevenness could vary within a single institution.⁶⁹

Arising from scholarship concerning the relationship between institutional forces and the experience of Students of Color in higher education, the term "campus racial climate"⁷⁰ has emerged to describe the degree to which institutions provide welcoming spaces in which Students of Color feel like equal members of the campus community.⁷¹ The presence of a positive racial climate reduces racial unevenness and positively impacts the academic outcomes of Students of Color.⁷² In contrast, a racially hostile climate can exacerbate racial unevenness and contribute to the mental anguish and academic underperformance of Students of Color.⁷³ Presence in such an environment has been described as being a "guest in another's house,"⁷⁴ a metaphor that reflects how Students of Color, although putative equals to their White counterparts, may feel that they "are not actually treated as legitimate members of the law school community."⁷⁵

68. See Kang, *Implicit Bias*, *supra* note 57.

69. For instance, even across classrooms the particular manifestation of racial unevenness likely depends on the race of the instructor, the racial composition of the students and the subject matter of the course. While Latino students may normally feel particular burdens in a first-year property course, racial unevenness may shift to a White student who finds herself as a token in a class on Latinos and the law.

70. See generally Harper & Hurtado, *supra* note 15 (conducting a meta-analysis on campus racial climate research gathered between 1992 and 2007).

71. Solórzano, *supra* note 9, at 62.

72. See *id.* at 63.

73. *Id.* This use of the term "hostile" to describe negative campus racial environments does suggest that such institutions intentionally create uninviting environments. The phrase is a term of art that describes experience, not intentions or motives. As suggested by DAC Survey's finding, see *infra* Part III, racially hostile climates may exist even at institutions that actively attempt to create a positive racial climate.

74. Hunt, *supra* note 30, at 774.

75. *Id.*; see also Walter Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 LA RAZA L.J. 237, 246 (2001).

A multitude of factors impact an institution's campus racial climate, none of which are independently determinative.⁷⁶ Relevant factors include: (1) personal interactions; (2) the racial composition of students, faculty and administrators; (3) the degree to which People of Color are included in campus activities; (4) the institution's commitment to diversity and pluralism; (5) responsiveness to the needs and concerns of Students of Color; (6) the breadth of courses offered, (7) the general ideological disposition of members of the community; and (7) the physical space (including decorations and images on the wall).⁷⁷ Internal contradictions also have the ability to impact campus racial climate. For instance, even though formally rejected, lingering and pervasive stereotypes regarding the intellectual inferiority of Students of Color, especially Black and Latina/o students, remain prominent at many institutions.⁷⁸ In the presence of such stereotypes, racial unevenness can become particularly acute when an institution's claim and self-presentation of racial inclusiveness is juxtaposed with a failure to adequately address student concerns.

(1) *Racial Demographics*

Since an institution's racial composition affects the racial norm, a law school's racial demographics will directly impact levels of racial unevenness, and as a consequence, students' experience. Students of Color remain underrepresented in most elite American law schools, which remain more than 60% White.⁷⁹ In such institutions, which continue to house large majorities of White male faculty and administrators, particular classrooms may contain no more than one or two Students of Color. For these students, simply existing as a racial token can produce a race-dependent harm that race-normed students

76. See Daniel G. Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 16 (2002).

77. See Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. EDU. REV. 659, 672 (2009) ("Students' physical world also elicits cultural alienation, featuring campus sculptures, buildings, flyers, and office postings that do not reflect Chicana/o histories or experiences. The cars and clothes of the predominately White student body further evidence the physical reproduction of White middle-class culture.").

78. *Id.*; cf. RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994); Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

79. Admissions statistics as reported on law schools' websites. See, e.g., *HLS Profile and Facts*, HARVARD LAW SCHOOL (Sept. 21, 2012), <http://www.law.harvard.edu/prospective/jd/apply/classprofile.html> (reporting 39% Students of Color for class of 2015); *Admissions*, YALE LAW SCHOOL (Oct. 7, 2012), <http://www.law.yale.edu/admissions/admissions.htm> (reporting 32% Students of Color for class of 2015); *J.D. Admissions – Experience*, COLUMBIA LAW SCHOOL (Oct. 7, 2012) <http://web.law.columbia.edu/admissions/jd/experience/class-profile> (reporting 38% Students of Color for the Class of 2015).

never confront.⁸⁰ The experience of existing as a token has been described in the following way:

A is the only Black student taking Medieval Literature; he is likely to feel like, and to be perceived as, “the Black kid” in the class. When B is the only woman majoring in Mechanical Engineering, she is likely to feel like, and to be perceived as, not just an Engineering major, but a woman majoring in Engineering. But when there are multiple members of one’s racial or gender group present, a person’s identity is less defined by group membership. Now A is just a student taking Medieval Literature and B is just someone studying Engineering.⁸¹

This description reflects tokenism’s most common consequences: distortion of individual characteristics, racial polarization, and super-visibility.⁸² Distortion refers to the tendency of majority group members to impose stereotypes on minority group members while simultaneously failing to accept behavior that challenges stereotypes.⁸³ The related phenomenon of polarization refers to increased salience gained by characteristics that distinguish minority and majority group members even when such factors have little connection to task performance.⁸⁴ Super-visibility refers to the phenomenon whereby tokens are “over-observed.”⁸⁵

In the law school context, super-visibility manifests as a double-edged sword; token status produces the dual phenomena of hyper-invisibility and hyper-visibility.⁸⁶ Similar to other forms of racial unevenness, although hyper-invisibility and hyper-visibility is obvious to the person bearing its burden, race-normed members of the class are rarely cognizant of such a phenomenon until it is explicitly marked.⁸⁷

Hyper-invisibility refers to the majority of class conversations in which the professor and fellow (i.e. White) students act as if the Student of Color is

80. See, e.g., Eve Spangler et al., *Token Woken: An Empirical Test of Kanter’s Hypothesis*, 84 AM. J. SOC. 160 (1978); Leonard Springer et al., *Effects of Small-Group Learning on Undergraduates in Science, Mathematics, Engineering, and Technology: A Meta-Analysis*, 69 REV. EDU. RESEARCH 21 (1999); Egbert Harskamp et al., *Group Composition and Its Effect on Female and Male Problem-Solving in Science Education*, 50 EDU. RESEARCH 307 (2008); see also William J. McGuire et al., *Salience of Ethnicity in the Spontaneous Self-Concept as a Function of One’s Ethnic Distinctiveness in the Social Environment*, 36 J. PERS. SOC. PSYCHOL. 511 (1978).

81. See Brief of Experimental Psychologists, et al. as Amici Curiae Supporting Respondents, *Fisher v. University of Texas* (August 13, 2012) (No. 01-1015).

82. See Spangler, *supra* note 80, at 162.

83. *Id.*

84. *Id.*

85. *Id.* at 161.

86. See generally Rita Sethi, *Speaking Up! Speaking Out! The Power of Student Speech in Law School Classrooms*, 16 WOMEN’S RTS. L. REP. 61, 63 (1994); Spangler, *supra* note 81, at 162.

87. See generally Sethi, *supra* note 86. Personal conversations commonly reveal that White students are unaware of this phenomenon until it is explained to them.

not present.⁸⁸ Invisibility likely arises in part from lingering stereotypes about Black and Latino intellectual ability. Whether explicit or implicit, these biases manifest when a professor fails to actively solicit substantive input from Students of Color. Even if avoidance is not the product of malice or explicit biases, failure to engage students on an equal basis can be perceived as demeaning and presumptive behavior that communicates that the professor does not value each student's contribution equally.⁸⁹

Juxtaposed with hyper-invisibility, hyper-visibility refers to the attention placed on Students of Color when race explicitly enters a conversation.⁹⁰ Such moments, in which all eyes seemingly turn to the Student of Color, produce intersecting harms and a related "spokesperson pressure."⁹¹ First, the student's ability to be heard as an individual is buried beneath the expectation that they will speak on behalf of an entire group.⁹² Second, seeking input on "racial" issues only communicates that the student's contributions are limited to discussions about race (the student's apparent area of expertise). Third, regarding race as relevant only when directly invoked suggests that race is not otherwise present or relevant to classroom discussions, a view that may conflict with a student's life experience.⁹³

(2) *Perceptive Divergence*

Two individuals can occupy the same space and witness the same events, yet perceive the event's racial implications in profoundly different ways.⁹⁴ This

88. See Solórzano, *supra* note 9, at 65 (observing that African American students discussed feeling "invisible" in the classroom); see also Quaylan Allen, *Racial Microaggressions: The Schooling Experiences of Black Middle-Class Males in Arizona's Secondary Schools*, 1 J. AFR. AM. MALES EDU. 125, 130 (2010) (discussing hyper-invisibility and the experience of middle class Black males in high school).

89. Hunt, *supra* note 30, at 774.

90. See Solórzano, *supra* note 9, at 27 (discussing a black student's experience on the UC-Berkeley undergraduate campus: "I am the only Black student in the classroom, a Black issue comes up and I feel all eyes on me. They expect me to be their expert on Black people! Sometimes I have to remind them that I had gone to the same White school system they went to, and wasn't taught about our history or psychology or anything. Just because I am black, they expect that I know all about the African American experience").

91. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

92. Solórzano, *supra* note 9, at 69.

93. *Id.* at 69–70; Valerie Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERS. SOC. PSYCHOL. 615 (2008).

94. Cf. Claude M. Steele, *A Threat in the Air*, 52 AM. PSYCHOL. 613, 613 (1997) [hereinafter Steele, *A Threat in the Air*] ("From an observer's standpoint, the situations of a boy and a girl in a math classroom or of a Black student and a White student in any classroom are essentially the same. The teacher is the same; the textbooks are the same; and in better classrooms, these students are treated the same. Is it possible, then, that they could still experience the classroom differently, so differently in fact as to significantly affect their performance and achievement there?").

reality is often the reflection of perceptive divergence,⁹⁵ whereby raced individuals are more likely than race-normed individuals to be self-conscious of their own race, view their own race as relevant to others' perceptions of them, and attribute race as a cause underlying a particular event.⁹⁶ Independent of actual disparate treatment, this heightened perception of race's relevance is sufficient to produce and exacerbate feelings of isolation, alienation, and negative campus climate.⁹⁷ For raced students at highly competitive law schools, the burdens flowing from perceptive divergence constitute another unique hurdle that their race-normed counterparts never face.

Perceptive divergence could be understood in various ways. First, it could be evidence that raced individuals are better than their race-normed counterparts at identifying racial bias.⁹⁸ Under this view, which invokes claims that those "on the bottom" have special and distinct insights about the oppression they face, there is no difference between perceptive divergence and disparate treatment; perceptive divergence simply reflects raced individuals' better "racial bias-radar." Alternatively, perceptive divergence could be evidence that raced individuals are oversensitive and inaccurately attribute race to otherwise race-neutral events. Under this interpretation, the better "racial bias-radar" belongs to race-normed individuals.

These dueling interpretations, by framing perceptive divergence as a reflection of better or worse measures of objective reality, misdiagnose the relevance of perceptive divergence. Perceptive harms, which are most likely to afflict raced individuals, do not disappear simply because an individual inaccurately interprets an incident to be the product of racial bias. The perception of racial bias can produce a burden in itself, regardless of its basis in "objective" truth. The two framings, therefore, are somewhat inapposite to the more fundamental question of whether or not a race-dependent harm exists.

As previously mentioned, heightened racial self-consciousness forms the core of perceptive divergence. This burden, which commonly manifest as perceived hyper-visibility, is most likely to afflict raced individuals because

95. Our conception of perceptive divergence tracks closely to Russell Robinson's articulation of perceptual segregation. See Robinson, *supra* note 29 (discussing how racial and gender identities influence the way people perceive a moment of alleged discrimination).

96. Perceptive divergence can also arise when two people learn about a past incident. See Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1274 n.153 ("I have noticed that responses tended to vary depending on the gender and race of the listener. From my own unscientific observations, I recognized that stories were often better received by people of color and by women than by white men.").

97. See Harper & Hurtado, *supra* note 15, at 13. Perceptions about racial climate have been shown to affect students' sense of belonging into their junior year of college. See Sylvia Hurtado & Deborah F. Carter, *Effects of College Transition and Perceptions of the Campus Racial Climate on Latino College Students' Sense of Belonging*, 70 SOC. EDU. 324 (1997).

98. Cf. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

they fall outside of the racial norm. Although interpersonal interaction can exacerbate racial self-consciousness, it is not a necessary predicate. Mere presence as a racial other is often sufficient. Most readers can recall such an experience.⁹⁹ For some, especially People of Color living in the United States, this may be a daily occurrence. For others, principally White Americans who spend little time in spaces where Whites constitute a minority, it may be less common. In fact, unless their own race is directly marked, race-normed individuals are unlikely to ever experience racial self-consciousness.

The severity and impact of heightened racial self-consciousness depend on many of the same factors that impact racial climate, such as a group's racial composition and the stereotypes that attach to the raced individual. Perceptive divergence therefore will not impact Students of Color uniformly just because they fall outside of the racial norm. The most salient stereotypes that attach to Black and Latino students differ from those that attach to Asian students. As a result, performance pressures and self-awareness may correspondingly differ. Although Asian students may face stereotypes of foreignness or passivity, Black and Latino students are more likely to battle a presumption of intellectual inferiority. The presence of either stereotype may produce feelings of marginalization and a depressed sense of belonging, but stereotypes affecting Black and Latino students are more likely to erode students' confidence in their academic abilities.¹⁰⁰ And even within a particular racial group, intra-group differences will impact the degree to which heightened racial self-consciousness burdens any individual.¹⁰¹

Beyond heightened racial self-consciousness, raced individuals are more likely than their race-normed counterparts to perceive race as a causal factor underlying negative interactions. This phenomenon—the tendency to attribute a racial cause to a negative interaction—is known as stigma consciousness.¹⁰² Racial demographics and the prevalence of negative stereotypes directly impact

99. We imagine that many readers will be familiar with the phenomenon of heightened racial self-consciousness. For those who are not, we recommend spending a few hours someplace where you are a racial minority. You will likely be acutely aware of your race; this is the other side of perceptive divergence.

100. See Solórzano, *supra* note 9, at 66; Sylvia Hurtado et al., *Latino Student Transition to College*, 37 RES. HIGHER EDU. 135, 152 (1996) (“Even the most talented Latinos are likely to have difficulty adjusting if they perceive a climate where majority students think all minorities are special admits [and] Hispanics feel like they do not ‘fit in.’ . . . Students may internalize these climate observations, presumably because these are more difficult to identify or sanction than overt forms of discrimination.”); Sharon Fries-Britt & Bridget Turner, *Facing Stereotypes: A Case Study of Black Students on a White Campus*, 42 J. COLLEGE STUDENT DEV. 420 (2001).

101. An individual's “blackness,” for instance, may impact her ability to combat and maneuver through mechanisms of racial unevenness within an institution. See Devon W. Carbado & G. Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When they Get There*, 61 WASH. & LEE L. REV. 1643 (2004); Carbado, *Working Identity*, *supra* note 28.

102. Elizabeth Pinel et al., *Getting There Is Only Half the Battle: Stigma Consciousness and Maintaining Diversity in Higher Education*, 61 J. SOC. ISSUES 481, 482 (2005).

how strongly raced students believe such stereotypes inform their interactions with out-group individuals.¹⁰³ When stigma consciousness is high, Students of Color are more likely than their White peers to perceive their institutions to be racist and to associate feelings of alienation on campus with racial prejudice and discrimination.¹⁰⁴ Even when White students are aware of racial hostility on campus, Students of Color tend to view campus climate more negatively.¹⁰⁵ Since racial unevenness is likely to differ across racial groups, stigma consciousness and perceptions of campus racial climate are likely to similarly diverge.¹⁰⁶

Heightened levels of stigma consciousness will also impact a student's ability to contend with racial microaggressions, which constitute the "brief, everyday exchanges that send denigrating messages to people of color because they belong to a racial minority group."¹⁰⁷ Since microaggressions are subtle in nature – often the product of verbal exchanges, slight "snubs or dismissive

103. *Id.*

104. See Sylvia Hurtado, *The Campus Racial Climate: Contexts of Climate*, 63 J. HIGHER EDU. 539, 546 (1992) (citing a study in which only 28% of Black and Chicano students perceived the university as being supportive of minority students, while 68% of White students agreed that it was); see also Harper & Hurtado, *supra* note 15, at 12 (citing S. R. Rankin & R. D. Reason, *Differing Perceptions: How Students of Color and White Students Perceive Campus Racial Climate for Underrepresented Groups*, 46 J. COLLEGE STUDENT DEV. 43 (2005)). In one 1993 study, contrary to the majority of sampled White students, "[a]lmost all of the sampled African American students reported having borne the brunt of racist remarks and most assumed that African Americans would be mistreated on campus." *Id.* (citing Anthony R. D'Augelli & Scott L. Hershberger, *African American Undergraduates on a Predominantly White Campus: Academic Factors, Social Networks, and Campus Climate*, 62 J. NEGRO EDU. 67, 77 (1993)).

105. See Harper & Hurtado, *supra* note 15, at 12 (citing A. F. Cabrera & A. Nora, *College Students' Perceptions of Prejudice and Discrimination and Their Feelings of Alienation: A Construct Validation Approach*, 16 REV. EDU./PEDAGOGY/CULTURAL STUD. 387 (1994); see also Janet K. Swim et al., *African American College Students' Experiences with Everyday Racism: Characteristics of and Responses to These Incidents*, 29 J. BLACK PSYCHOL. 38 (2003) (observing that 36% of participants reported unfriendly looks and skeptical stares, 24% percent reported confronting derogatory and stereotypical verbal remarks, 18% reported bad service received in settings on and off campus, and 15% reported other assorted incidents, including general rudeness and awkward or nervous behavior on the part of Whites; with students attributing the foregoing experiences to racism).

106. Hurtado, *supra* note 100, at 546 (highlighting a study that found that "Black students were most likely to perceive a hostile racial climate on campus, but Hispanics were more likely than white students to perceive such hostility"). This divergence is highlighted in a series of studies in which Black students were consistently more likely than any other racial group to "report lower levels of satisfaction with racial climates and perceive differential treatment on the basis of race." Harper & Hurtado, *supra* note 15, at 12.

107. See Sue et al., *supra* note 9, at 278 ("[M]icroaggressions (a) tend to be subtle, indirect, and unintentional, (b) are most likely to emerge not when a behavior would look prejudicial, but when other rationales can be offered for prejudicial behavior, and (c) occur when Whites pretend not to notice differences, thereby justifying that 'color' was not involved in the actions taken.").

looks, gestures, and tones” – perpetrators rarely recognize their harm.¹⁰⁸ In conjunction with the earnest belief that people are not racist and the availability of non-biased justifications,¹⁰⁹ perpetrators are often able to explain away actual racial bias.¹¹⁰

Since perpetrators are often White, most have not experienced a litany of racial microaggressions throughout their own lives. As a result, even if perpetrators admit that an incident was racially motivated, they are likely to deemphasize its severity.¹¹¹ This response, which communicates that People of Color are hypersensitive and should develop thicker skin, effectively denies the relevance and probative value of the victim’s viewpoint.¹¹² By reallocating fault to the victim and delegitimizing the victim’s perspective, this behavior exacerbates the incident’s initial harm.¹¹³

The subtle nature of racial microaggressions and the availability of alternative explanations poses a different problem for victims. Whereas perpetrators are able to dismiss race’s relevance, victims may struggle with questions regarding whether they actually are overreacting and reading too much into an innocent act.¹¹⁴ This identification challenge, which does not arise from easily identifiable and categorizable acts of invidious discrimination,¹¹⁵ creates internal dilemmas that exacerbate and prolong a microaggression’s initial harm.

108. *Id.* Environmental conditions unrelated to treatment can also produce racial microaggressions. For instance, though seemingly innocuous, a law school’s hallway display of White male judges can send messages about who does and does not belong in the legal profession.

109. For some White Americans, this self-trust exists alongside the belief that reverse discrimination against Whites has eclipsed racism against People of Color. *See* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that they Are Now Losing*, 6 *PERSP. PSYCHOL. SCI.* 215 (2011); *cf.* Chang, *supra* note 96, at 1247 n.11 (1993) (describing a 1991 poll that “revealed that the majority of American voters believe that Asian Americans are not discriminated against in the United States” and that “[s]ome even believe that Asian Americans receive ‘too many special advantages’”).

110. *See* Sue et al., *supra* note 9, at 275. One could also argue that claims of racism conflate racial bias with economic conservatism. To the extent such claims are warranted, it is equally important not to conflate principled conservatism, in which racial outcomes correlate to otherwise principled views, with modern racism, in which views are actually the product of racial bias. *See* Song Hing et al., *A Two-Dimensional Model that Employs Explicit and Implicit Attitudes to Characterize Prejudice*, 94 *J. PERS. SOC. PSYCHOL.* 971 (2008).

111. *See* Sue et al., *supra* note 9.

112. *See, e.g.,* Yosso, *supra* note 77, at 671 (“All too often, as this Latina anticipated, when students spoke out against racial jokes, they found themselves on the defensive, responding to accusations of being “complainers,” “whiners,” “too sensitive,” and not able to “take a joke.””).

113. One Black female undergrad from Berkeley described the experience of self-silencing in the following terms: “There are times when I want to be angry, but I don’t want to fall into what they think every Black woman is and so a lot of times, I find myself restricted form saying what I feel or doing what I feel because I don’t want to perpetuate negative stereotypes.” Solórzano, *supra* note 9, at 42.

114. *See* Sue et al., *supra* note 9, at 278–79.

115. *See* Solórzano, *supra* note 9.

(3) *Stereotype Threat*

Stereotype threat is another harm that can arise from environmental factors even in the absence of disparate treatment. This phenomenon refers to the “social-psychological threat that arises when one is in a situation or doing something for which a negative stereotype about one’s group applies.”¹¹⁶ Stereotype threat is distinct from student disengagement and the internalization of negative stereotypes. Rather, stereotype threat refers to the cognitive burden that arises when an individual attempts to perform a challenging task when failure would affirm a known negative stereotype about that individual’s group. This threat, which only depresses performance when an individual is pushed to the limit of her ability, most commonly affects the most talented within a group.¹¹⁷

Due in part to stereotype threat, standardized tests and other common measures of intellect consistently under-measure the intellectual ability of individuals from racial groups that face negative stereotypes in academic settings.¹¹⁸ This undermeasurement accounts for a significant portion of the achievement gap that traditional explanations such as socioeconomic status or preparation cannot account for.¹¹⁹

Since stereotype threat results from the “psychological context” in which students perform academic tasks, the prevalence of negative stereotypes alongside the severe underrepresentation of Latina/o and Black students in law school is likely sufficient to produce high threat conditions.¹²⁰ As such, time-sensitive first-year examinations are likely to underestimate the talent of Black and Latina/o students.¹²¹

Two seminal studies illustrate the effect and breadth of this phenomenon. In one study, researchers administered a set of GRE questions to Black and White Stanford University undergraduates.¹²² When researchers described the questions as diagnostic of intellectual ability, thus priming a negative

116. Steele, *A Threat in the Air*, *supra* note 100, at 614. For a description of the cognitive mechanism driving stereotype threat, see Toni Schmader, Michael Johns & Chad Forbes, *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 *Psychol. Rev.* 336 (2008); Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 *J. PERSONALITY & SOC. PSYCHOL.* 440 (2003).

117. See STEELE, WHISTLING VIVALDI, *supra* note 45, at 56–59.

118. See Walton et al., *supra* note 1. Stereotype threat has been identified as causing as much as a .25 standard deviation on some standardized tests for both women and Students of Color. See Walton & Spencer, *supra* note 1, at 1137.

119. While most stereotype threat research has occurred in the laboratory setting, recent findings support the hypothesis that stereotype threat extends to real world contexts. See Walton et al., *supra* note 1, at 8–13 (discussing studies that support the assertion that stereotype threat affects real world performance).

120. *Id.*

121. See Feingold, *supra* note 1, at 240 (discussing how first-year exams taken in high threat environments have the potential to mismeasure the ability of Students of Color).

122. See Steele & Aronson, *supra* note 91.

stereotype about Blacks, Black participants performed significantly worse than their White counterparts.¹²³ When the same questions were presented as a problem solving experiment, thus removing the relevance of stereotypes concerning intellectual ability, participants displayed no observable disparity.¹²⁴

In a later study, Asian American female students with high math ability took a series of difficult math questions.¹²⁵ Prior to answering the questions, the students filled out one of three questionnaires that primed their gender identities, primed their racial identities or primed no identity. The initial priming enabled researchers to observe the interaction between performance and a negative stereotype (women and math) as well as performance and a positive stereotype (Asians and math).¹²⁶ Priming a particular identity directly impacted performance. Students in the control group answered on average 49% of the questions correctly, students in the race-primed group answered 54% correctly, and students from the gender-primed group answered only 43% correctly.¹²⁷ These findings illustrate the dynamic nature of stereotype threat; in addition to negative stereotypes depressing academic performance, positive stereotypes have the potential to boost performance.

II. RACIAL UNEVENNESS IN LAW SCHOOL

Having unpacked the dimensions of racial unevenness, in this Part we begin by explaining the high stakes of law school's first-year exams. From here, we analyze the most common manifestations of racial unevenness in America's top law schools. To be clear, we are not arguing that institutions should accommodate certain students who cannot handle the rigor of law school.¹²⁸ There is great value in a professional school environment that demands excellence from its students. For many students, regardless of race, law school presents an immensely trying and traumatic experience. Racial unevenness changes this baseline by injecting a layer of difference into an already highly competitive and challenging educational environment. These race-dependent burdens, which White students do not face, create obstacles above and beyond the law school's baseline challenges.

123. *Id.* at 799-802.

124. *Id.*

125. Margaret Shih, Todd L. Pittinsky & Nalini Ambady, *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999).

126. *Id.* at 80-82

127. *Id.* at 80.

128. Although racial unevenness has little to do with the baseline difficulty of a particular task, it is most likely to produce disparate results on difficult tasks. *Cf.* Walton et al., *supra* note 1 (explaining that stereotype threat is likely to impact performance only when an individual is pushed to the limits of her ability).

There is nothing novel about the claim that race-dependent harms pervade law school. One prior articulation described law school as:

a forked river, with one side offering a challenging and often dangerous white-water rapids course, the other side a swift but smooth current. . . All minority law students are made to ride the former, and they are often joined by older law students, law students with physical or learning disabilities, and law students from disadvantaged socioeconomic origins.¹²⁹

A. The Stakes - Pathways and Prerequisites

In many educational environments, students receive a variety of feedback and evaluation throughout the life of a particular course. Feedback commonly comes in the form of shorter assignments, quizzes or midterm examinations. By contrast, most American law schools provide no student evaluation outside of a single, final exam. This format is common in most first-year courses, which are pre-assigned to students and involve subject matter that is nearly uniform across accredited law schools. As a consequence, a student's first year GPA usually is based solely on two or three sets of final exams, depending on whether the school operates on a semester or quarter schedule. Furthermore, a strict grading curve – especially in the first year – limits the number of As and Bs a professor can give.¹³⁰ Since GPA is often the first thing a potential employer looks at, perhaps in conjunction with the student's law school, final exams heavily determine a student's initial career opportunities.

Beginning with a student's first semester, and especially following the first year, final exam grades place students on a particular track. A student's track determines the ease with she is able to "win" at law school. For purposes of this Article, we define "win" as the ability to access law school's most coveted resources and rewards. These resources and rewards become immediately self-perpetuating; early resources and rewards are prerequisites for the later, more coveted prizes. Failing to win early-on does not eliminate a student's ability to access a later prize, but early victories make later prizes significantly easier to obtain. A student's early success thus largely determines their law school destiny.

The most coveted prizes include (more or less in chronological order): joining a study group;¹³¹ first semester grades; first year grades; membership

129. Clydesdale, *supra* note 11, at 712.

130. See BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 96 (2012).

131. See, e.g., Solórzano, *supra* note 9, at 66–67 (discussing the prevalence of low expectations even in the face of contradictory evidence and students' frustration in attempting to find study group partners at the undergraduate level); Hunt, *supra* note 30. Study groups, similar to the subsequent prizes, are a highly valued and sought-after law school commodity. Many students believe academic success in law school depends in part on the ability to gain entry into a strong study group. Study groups intersect with racial unevenness because the politics and

on law review; second-summer job at an elite, high-paying, large law firm; a clerkship for a federal (appellate) judge; a prestigious fellowship; an associate position at that same elite, high-paying, large law firm; and potentially a future position as law faculty. Each prize is either a means or an end to the ultimate goals of money and power.¹³²

The significance of first-semester and first-year grades cannot be understated. The traditional second summer of law school is spent at a large law firm. Most interviewing and hiring for these positions occurs during the fall of the second year. Thus, employers are looking primarily at students' first-year GPAs. The majority of large firms (and other employers) uses GPA as a guidepost, if not a threshold.¹³³ First-year grades are the gatekeepers that determine which students can get in the door.

In addition to grades, many employers highly value student membership on an institution's flagship law journal.¹³⁴ This view arises in part from the common perception that membership on such journals signals something about a student's ability and talent. However, access to the most coveted journals is often related to a student's first year grades. Even when first-year grades are not determinative for all students,¹³⁵ there is often a correlation between first year grades and journal membership. Membership on a school's flagship journal provides access to power and opportunity within and outside of law school. Much of this power originates from the prestige associated with journal membership. Internal power derives from the special privileges, access to resources, and physical space that journal membership entails. Externally, journals provide access to exclusive alumni networks and coveted career opportunities.

Beyond access to competitive law firms, journal membership acts as a direct conduit, and in many cases a necessary prerequisite, to federal clerkships. Among law school's various competitions, the quest for federal clerkships is

negotiation that goes into the formation of study groups have the potential to communicate underlying assumptions about who is, and who is not, likely to finish at the top of the class

132. We recognize that many individuals enter law school without the goal of gaining high earning power. Many students enter premier law schools specifically intending to enter the public sector or engage in public interest work. As such, the above formula is underinclusive in terms of students' entering interests and desires as well as some of the prizes sought. However, although personal, ideological and political commitments will vary, the ability to realize one's goals is directly related to one's individual power, which arises in large part from a law school resume. Regardless of the sphere one wishes to enter, GPA plays a determinative role in providing access and opening doors.

133. Some law firms use a GPA floor, below which they will rarely consider an applicant.

134. Legal scholarship is published through student-run law journals. Although most law schools have a variety of journals, the institution's flagship journal (often referred to as the "Law Review") is by far the most prestigious. Student membership on secondary journals carries far less weight.

135. Some schools, such as UCLA Law, make grades relevant for only a portion of students.

perhaps the most competitive. The prestige of a federal appellate court clerkship is difficult to match in the legal community. Such clerkships, especially at the appellate level, often provide unmatched experience alongside access to more coveted prizes and positions. In the same way that membership on a journal sets an otherwise identical resume apart, an appellate clerkship has rather unparalleled signaling power. And again, it likely all began with a student's first-year grades.

Beyond signaling talent or merit to future employers, first-semester and first-year grades indicate to students whether law school was the proper choice, the proper fit, and whether "I belong here." In an environment that is often competitive and disorienting, early failure can erode students' confidence and sense of self. Compounded by racial unevenness, Students of Color who experience academic disappointment may be particularly vulnerable to disassociate from law school. In the aggregate, disassociation and related underperformance may reproduce stereotypes about who does and does not belong in a particular institution.

B. The Harm - A Temporal Framing

Assuming that racial unevenness is present during the first semester of law school, Students of Color confront unique hurdles, and therefore must do more to achieve the same result, than their White colleagues. With respect to unevenness generally, the situation resembles that involving Anne and Dan from our opening hypothetical. To understand the most common manifestations of racial unevenness in law school, we employ the following temporal framework: (1) the final exam, (2) before the final exam, and (3) after the final exam.

1. The Final Exam

As described above, first-semester and first-year grades significantly impact a student's law school destiny. Since evaluation is limited to the final exam, first-semester grades mark one of the first moments where the measurable consequences of racial unevenness are likely to appear.¹³⁶

In addition to race-dependent burdens that manifest prior to a final exam, stereotype threat is likely to burden Black and Latino students during the exam itself. As described above, stereotype threat detrimentally impacts an individual's performance when undertaking a particular task to which a

136. Disparate attrition rates may provide another means of measuring racial unevenness in law schools.

negative stereotype about her group applies.¹³⁷ Law school final exams often present the factors necessary to produce this psychological threat.

In relevant ways, law school exams are similar to tests such as the SAT and MCAT, in which the effects of stereotype threat have been documented.¹³⁸ First, law school finals are widely understood as evaluative of intellectual ability. Second, negative stereotypes about the intellectual abilities of Black and Latino students remain prevalent on law school campuses; students may perceive that poor performance on an exam would confirm the negative stereotype.¹³⁹ Third, law school exams often involve novel and complex legal problems and present students with incredible time constraints that resemble the speeded nature of the SAT and LSAT. The impact of these factors, likely sufficient to trigger stereotype threat, can become exacerbated in classrooms with only a token number of Students of Color.¹⁴⁰ Black and Latina/o students who find themselves in such classrooms are therefore most prone to confront stereotype threat and the racial harms it produces.

2. *Before the Final Exam*

The presence of racial unevenness prior the exam can exert its own, significant harm, which Students of Color must overcome to enter the final exam on equal footing with their White counterparts. This pre-exam racial unevenness is symbolized by the two metaphorical rivers referenced above; Students of Color must contend with white-water rapids while White students enjoy a gentle current.

These rivers remain divergent in part due to the pervasive use of traditional legal pedagogy, known as the case method, in first-year law school classrooms. The case method, which has dominated American law schools since Christopher Columbus Langdell introduced it to Harvard Law School in the 1870's, requires students to divine abstract legal principles from appellate decisions.¹⁴¹ Langdell developed the case method in response to critiques that lawyering and legal analysis were not serious and rigorous endeavors.¹⁴² The

137. Steele, *A Threat in the Air*, *supra* note 100, at 614. For a description of the cognitive mechanism driving stereotype threat, see Schmader, *An Integrated Process*, *supra* note 116; Schmader, *Converging Evidence*, *supra* note 116.

138. See *id.* at 13–15 (estimating the stereotype threat effect on the SAT).

139. See, e.g., Sander, *supra* note 78 (arguing that Black and Latino students who gain admission to law school through race-conscious admissions policies are at a disadvantage because they are academically inferior to their counterparts who were not admitted through such programs); Kendra Fox-Davis, *A Badge of Inferiority: One Law Student's Story of a Racially Hostile Educational Environment*, 23 NAT'L BLACK L.J. 98 (2010) (describing the impact that Sander's mismatch theory had on the author's law school experience).

140. *Id.*

141. Chang, *supra* note 96.

142. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (2d ed., 1999).

case method, which attempts to frame law as a “scientific” endeavor, has shrouded legal analysis under the veil of racial-neutrality ever since.

Although few would still argue that legal analysis actually occurs in a perspectiveless vacuum, the presentation of legal doctrine continues to rely on the assumption that the law has evolved, and continues to function, through race-neutral legal principles. These principles, which students uncover in appellate opinions, are presented as natural conclusions, unrelated to the implicit and explicit racial biases and perspectives of the judges who developed the law. However, since the judiciary has remained predominately White and male, legal principles have been shaped by a particular racial (and gendered) lens.¹⁴³ This reality runs in tension with the articulation of legal analysis as an objective endeavor in which one’s race is irrelevant to outcome.¹⁴⁴

Presenting legal analysis as a race-neutral endeavor produces racial unevenness in the following way: allegedly race-neutral legal principles dictate what facts are relevant, sufficient or necessary to solve a particular legal problem. Due largely to the legacy of a White (i.e. race-normed) judiciary, facts about race and social context have been overwhelmingly marginalized to the category of irrelevant evidence. “Objective” legal analysis provides little space for the invocation of race.

One of a law student’s first challenges consists of learning how to distinguish relevant and irrelevant facts. This task can pose heightened challenges for students who understand the world and their lived experience through a racially salient lens.¹⁴⁵ Since traditional legal pedagogy has largely exorcised race from “objective” legal analysis, students who attempt to inject race into classroom conversations risk reprimand for adopting an inappropriately “perspectived” approach. At a minimum, professors often communicate that race is best relegated to an extra-legal discussion. Having

143. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990).

144. See Chang, *supra* note 96 (“When the legal academy was made up exclusively of white males, a legal scholar did not have to reveal the context from which he spoke because everyone occupied the same context. This shared context fostered a false sense of acontextuality, where one could pretend to be aperspectival because only one perspective was represented. With the entry of women and persons of color into the legal academy and with their use of personal narratives in scholarship, whether perspective matters has become a contested issue.”). This notion of objectivity fails to recognize that “just as science has learned that the perspective of the observer can not only affect, but can also determine, what is observed, law must also recognize the importance of perspective.” *Id.*; see also Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17–19 (1989) (“Difficult as it is to view the world from someone else’s perspective, not to make the effort is to ignore what science learned long ago.”).

145. See generally Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 8 (1989) (discussing the “bifurcated thinking” that women of color must engage in to achieve and be rewarded for “proper” legal analysis).

gone through the same training, many professors struggle to meaningfully engage race even if they desire to do so.

Students entering law school with an interpretive lens that foregrounds race (or another axis of identity) face various choices.¹⁴⁶ They may engage in “bifurcated thinking” by suppressing the worldview they have always known in favor of a particular viewpoint deemed to be race-neutral and perspectiveless. Even though many students are able to perform this task, the coerced suppression of a race-conscious perspective is not without consequence.¹⁴⁷ This self-censoring privileges a particular perspective and may cause students to feel silenced or to have “compromised” their true identity.¹⁴⁸ Alternatively, those students unable or unwilling to discard a race-conscious lens are left vulnerable and exposed for abandoning a “race-neutral” viewpoint.¹⁴⁹ Although it may seem minor, this is another channel through which racial unevenness permeates law school.

Exacerbating the effect of traditional legal pedagogy are certain interpretive legal frameworks, such as Colorblindness, that expressly reject race’s relevance to legal analysis. Taken to the extreme, proponents of Colorblindness claim that the Constitution forbids the government from ever taking race into account.¹⁵⁰ This view is rooted in a formal conception of race;¹⁵¹ race is nothing more than skin color, unrelated to disparate outcomes or societal marginalization and subordination. Formal race manifests in statements

146. This unevenness need not occur strictly along racial lines. Not all Students of Color will have experienced race as a salient component of their identity. Nor will all White students have lived a life free from racial consciousness. Thus, this particular form of unevenness arising from legal pedagogy is arguably race-neutral. However, since Students of Color are more likely to bring a race-conscious perspective to class, they are more likely to suffer this burden.

147. As Chang states, “[i]n this way, rules of evidence silence us. In order to get our stories into evidence, we need to broaden or change the very meaning of evidence.” Chang, *supra* note 96, at 172.

148. *Id.*; see also Carbado, *Working Identity*, *supra* note 28.

149. Matsuda, *supra* note 145, at 8–9 (“A professor once remarked that the mediocre law students are the ones who are still trying to make it all make sense. That is, the students who are trying to understand the law as necessary, logical and co-extensive with reality. The students who excel in law schools – and the best lawyers – are the ones who are able to detach law and to see it as a system that makes sense only from a particular viewpoint.”).

150. Justice Harlan’s dissent in *Plessy v. Ferguson* has become the common citation to support this claim. See 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”). In citing Harlan’s dissent as the ideological foundation of Colorblindness, scholars too often fail to recognize that Harlan’s reasoning and conclusions were based in part on his openly racist views about the Chinese. See *id.* (“There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race.”); see also Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (critiquing traditional narratives of Harlan’s *Plessy* dissent).

151. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (articulating the notion of formal race).

such as “I don’t see color” and “We are all human beings.” Regardless of the underlying intent, these statements can create harm by denying the reality of historical and contemporary modes of racial oppression and discrimination.¹⁵² And by denying the existence of racial oppression as common to modern life, colorblindness excuses all but the most egregious and overt behavior as free from prejudice.

Conversations about affirmative action, common to first-year Constitutional Law classes, further illustrate the reciprocally reinforcing nature of Colorblindness and racial unevenness. This occurs both at the abstract level, when students refer to affirmative action as a “preference,” and at the more concrete level, when students wonder out loud whether their classmates were admitted because of affirmative action.¹⁵³ Both statements are damaging because they send a broader message about the qualifications of an individual and their racial group.¹⁵⁴ The presumption that certain bodies do not belong, which underlies such claims, communicates that Students of Color lack merit and objective qualifications.¹⁵⁵

Even if comments are subtle and not always the product of racial bias, constantly confronting messages that you (or your race) do not belong can create serious psychological and emotional harm. Solórzano reports that in addition to “self-doubt and frustration,” Black students “feel academically and socially alienated in spaces where such oppression occurs.”¹⁵⁶ This harm has been characterized as “racial battle fatigue”¹⁵⁷ and “Mundane Extreme Environmental Stress” (“MEES”). Solórzano elaborates on MEES:

152. Sue et al., *supra* note 9, at 274; see also JANET HELMS, A RACE IS A NICE THING TO HAVE: A GUIDE TO BEING A WHITE PERSON OR UNDERSTANDING THE WHITE PERSONS IN YOUR LIFE (1992).

153. *Id.* (“During a conversation about hiring or admissions, ‘I believe the most qualified person should get the job regardless of race,’ or when an employee or student of color is asked ‘How did you get your job.’ The underlying message is twofold: (a) People of color are not qualified, and (b) as a person of color, you must have obtained the position through affirmative action.”).

154. See Pinel, *supra* note 102, at 484; see also Deidre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197 (2010); Solórzano, *supra* note 9, at 67 (“[S]everal students indicated that key among the most negative racial assumptions Whites on their campuses held about them had to do with how African American students entered the university. . . .”).

155. Perhaps surprising to those who believe affirmative action stigmatizes Students of Color, such perceptions by Whites are most pronounced in states that have *banned* race-based affirmative action programs. See Bowen, *supra* note 154.

156. Solórzano, *supra* note 9, at 69.

157. Yosso, *supra* note 77, at 661 (“Symptoms associated with racial battle fatigue include: suppressed immunity and increased sickness, tension headaches, trembling and jumpiness, chronic pain in healed injuries, elevated blood pressure, constant anxiety, ulcers, increased swearing or complaining, insomnia or sleep broken by haunting conflict-specific dreams, rapid mood swings, difficulty thinking or speaking coherently, and emotional and social withdrawal. In anticipation of a racial conflict, reported symptoms include a pounding heartbeat, rapid breathing, an upset stomach, and frequent diarrhea or urination.”).

mundane, because this stress is part of our day-to-day experience and is so common that we almost take it for granted; *extreme*, because it has an extreme impact on our psyche and world view, how we see ourselves, behave, and interact; *environmental*, because it is environmentally located, induced and fostered; *stress*, because the ultimate impact is indeed stressful, detracting and energy-consuming.¹⁵⁸

Applied to the law school setting, such harms can exact an emotional and psychological cumulative toll on Students of Color. This is a burden their White counterparts never need to confront and often fail to see. We again see our two rivers, with disparately challenging currents that students must navigate on a daily basis.

3. *After the Final Exam*

Racial unevenness can arise after the final exam due to the way that institutions discuss and understand the existence of racial achievement gaps. As in other domains, law schools can too readily frame disparities as a consequence of “deficient” students.¹⁵⁹ Under this typical framing, the achievement gap is the result of students’ inherent inferiority¹⁶⁰ or inadequate preparation.¹⁶¹ By placing the fault for relative underperformance on students, this framing reinforces the underlying tropes about Black and Latina/o students’ intellectual abilities. Diagnosing the problem as deficient students also presumes that it is the students, as opposed to the institutions, that need “fixing.” This framing proceeds from the following formula: If two similarly situated students¹⁶² of different races enter law school with the same talent, they will have the same chance of success.

For institutions where racial unevenness is present, this formula is ill-founded. With evidence that race, independent of talent, preparation, work ethic or desire,¹⁶³ shapes opportunities for success in law school, we must critically

158. Solórzano, *supra* note 9, at 17; *see also* Sue et al., *supra* note 9 (arguing that “microaggressions are detrimental to persons of color because they impair performance in a multitude of settings by sapping the psychic and spiritual energy of recipients by creating inequities”).

159. *See* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 PENN. L. REV. 1075, 1109–13 (2009).

160. *See, e.g.*, HERRNSTEIN, *supra* note 78; ARTHUR JENSEN, EDUCABILITY AND GROUP DIFFERENCE (1973).

161. *See* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 402–03 (1997).

162. Similarly situated would mean, for instance, that the two students align along traditional demographic dimensions (such as gender, age, socioeconomic status, etc.) as well as academic preparation and desire. The point is to imagine two students who are identical except for their race.

163. *See, e.g.*, Clydesdale, *supra* note 11, at 737, 752 n.34 (observing disparate racial outcomes even when holding constant “LSAT scores, undergraduate GPAs, hours of planned study, hours of planned employment, various additional distractions, self-confidence, and even English language difficulties”); Ronald G. Fryer Jr. & Steven D. Levitt, *Understanding the Black-*

reexamine the role of our legal institutions in facilitating racial achievement gaps. As a first step, we must amend the dominant narrative of “deficient” students and instead focus on rectifying “deficient” institutions.

III. MEASURING RACIAL UNEVENNESS AT UCLA LAW – THE DAC SURVEY ON DIVERSITY AND CLASSROOM CLIMATE

Even for those readers who accept that racial unevenness exists in the abstract, many may remain skeptical that racial unevenness exists at an institution such as UCLA Law. Part of this skepticism may stem from the unease many readers feel with the words “racist” and “racism,”¹⁶⁴ which likely come to mind when reading a report on racial unevenness and racially hostile environments.¹⁶⁵ To avoid equivocation, our use of the terms *racial unevenness* or *racially hostile* to describe UCLA Law does not signify that we observed a conscious intent to create an unwelcoming environment for Students of Color. Although particular instances likely arise, the majority of the racial unevenness we observed does not appear to have been the result of intentional discrimination. Rather, our findings illustrate that the racially hostile environment that disproportionately burdens Students of Color exists notwithstanding UCLA Law’s best intentions.

Perhaps due in part to students’ inability to provide sufficient “evidence of racism,” or choice not to make such allegations, UCLA Law has been slow to recognize student claims that a problem of racial unevenness exists in the Law School. For the UCLA Law students who have felt this unevenness, it has been their burden to prove that racial unevenness does exist. The DAC Survey is the most recent iteration of this effort. In the remainder of this Article, we detail the methodology and results of the DAC Survey.

White Test Score Gap in the First Two Years of School, 86 REV. ECON. & STATISTICS 447 (2004) (“Even after controlling for a wide range of covariates including family structure, socioeconomic status, measures of school quality, and neighborhood characteristics, a substantial racial gap in test scores persists.”); Claude M. Steele, *Race and the Schooling of Black Americans*, 269 ATLANTIC MONTHLY 68 (1992) (arguing that standard explanations are incomplete, as low SAT scorers are not more likely to flunk out than high SAT scorers; achievement gaps exist even when Blacks do not suffer financial disadvantage; and controlling for any level of previous school preparation, Blacks achieve less in subsequent schooling than Whites).

164. As recent events remind us, few accusations are more damaging in our society than that of being a racist. See Feingold & Lorang, *supra* note 67 (discussing the national debate regarding whether or not George Zimmerman, the individual who shot Trayvon Martin, was racist). Recently, a federal judge denied the possibility that he was racist while simultaneously admitting the racist attitudes underlying a private email he sent to friends. See JOHN S. ADAMS, GREAT FALLS TRIBUNE, *Federal judge forwards racially charged email* (March 1, 2012), available at, <http://www.greatfallstribune.com/article/20120229/NEWS01/120229014/Chief-U-S-District-Judge-sends-racially-charged-email-about-president>; See also, Kang, *Are Ideal Litigators White?*, *supra* note 27 (asserting that “few terms generate greater anxiety, concern, resentment, and passion in U.S. society” than “racist” or “racism”).

165. For others, the terms “racist” and “racism” may be welcomed as the most appropriate and accurate way to describe institutions that embody the results we report below.

We first provide a brief historical review of UCLA Law's racial demographics. This summary is meant to highlight that Students of Color, especially Black and Latina/o students, were not always underrepresented at UCLA Law.¹⁶⁶ In 1994, Black and Latina/o students comprised over 100 students in the first-year class.¹⁶⁷ The adoption of Proposition 209 and the subsequent voluntary eradication of race-based admissions at UCLA Law triggered a dramatic shift in Law School's racial composition. By 1999, the entering class of 289 students included 3 Black and 18 Latina/o students only.¹⁶⁸ Over the subsequent twelve years, the numbers slightly improved. Despite efforts to recruit more Students of Color, out of 319 students, the 2011 entering class included 11 Black students and 25 Latina/o students.¹⁶⁹

A. Method

1. The Instrument.

The DAC Survey is a student-opinion survey that contained thirty discrete items.¹⁷⁰ Items fell into one of five categories:

1) Perception Items. The majority of survey items measured student perceptions of racial diversity and campus racial climate at UCLA Law. A minority of perception items dealt with gender and sexual orientation. Items in this group required students to make a descriptive claim that went beyond his or her individual experience. This differed from description items, which only inquired into a student's personal experience.

2) Description Items. As noted above, description items asked students about their own experience only. Inquiries about personal experience could be categorized as a form of perception. However, because there is an arguable difference between a student's perception about general climate and about his or her personal experience, we present these items as distinct.

3) Normative Items. Two items required students to make normative claims. Unlike perception and description items that required students to state how UCLA Law is, these items required students to state how they believe UCLA Law should be.

4) Demographic Items. The survey concluded with three demographic items concerning gender, sexual orientation, and race/ethnicity. For access to

166. Any claim of underrepresentation requires a comparator to measure representation. For UCLA Law, the racial demographics of Los Angeles or California are both arguably reasonable comparators. However, even using national statistics, Black and Latina/o students are proportionally underrepresented at UCLA Law.

167. Cheryl Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1237 (2002).

168. *Id.* at 1236.

169. Statistics provided by the UCLA Law Office of Admissions.

170. For a complete version of the survey, see Appendix A.

more nuanced data, students may want to consider including demographic items about socioeconomic status and class year in subsequent administrations of the DAC Survey.

5) Qualitative Item. The final survey item invited students to include any additional comments. This item was left open-ended so that students could write freely without any restriction.

2. Participants and Procedure

Eligible participants included currently enrolled UCLA Law students. Non-JD students and students who transferred into UCLA Law after their first year of law school were excluded. This decision was made based on the belief that the first year of law school is most determinative in shaping a student's perception of classroom climate.

The DAC Survey was administered to 300 randomly selected students from the eligible participant pool. To create this random sample, survey administrators assigned a unique number (1-1,003) to every first, second, and third-year UCLA Law student. This randomly assigned number corresponded to each student's photograph in the UCLA Law photo book. After assigning numbers, administrators utilized an Excel random number generator to create an indefinite list of numbers. The list was followed sequentially and students were selected from the eligible participant pool if their number appeared in the list. Administrators followed this process until 300 different students had been selected.

The DAC Survey was created and administered as a Google Form. Google Forms are electronically created surveys that may be administered over the Internet. The survey's administration consisted of a series of three emails that solicited survey participation from the universe of 300 selected participants. 178 students, or 59% of the 300 selected participants, completed the survey.

B. Results

The following section provides a summary of relevant findings. The majority of survey items presented students with a statement, and then instructed students to indicate their agreement or disagreement. Common response choices included: strongly agree; somewhat agree; neither; somewhat disagree; strongly disagree; no response. Unless otherwise indicated, this analysis chunks somewhat agree with strongly agree responses and somewhat disagree with strongly disagree responses. As such, the reported findings do not distinguish between respondents who marked strongly agree and somewhat agree. Both responses are treated as agree.

In order to compare responses across demographic categories, administrators cross-tabbed responses by race and gender. Race cross-tabs were performed on two levels of specificity. Administrators identified a student's

race by looking to the respondent's self-identified race on the racial demographic survey item. Five respondents did not select any race and were excluded from race cross tabs. Using the racial identifiers, administrators first divided students into two categories: White students and Students of Color. Since the racial demographic item allowed students to select more than one race, a number of respondents identified as multiple races. For students who marked multiple races, one of which was White, administrators had to choose whether to include students in the White or Students of Color category. For purposes of this Article, all students who selected White have been placed in the White category. Some will question this decision as running counter to the historical rule of hypodescent, in which whiteness is an exclusive category marked by absolute purity. Recognizing this critique, administrators recalculated many of the responses using an alternative grouping, wherein all students who marked two races were grouped in the Students of Color category. Changing the grouping did not alter results to a statistically significant degree.

1. Normative Survey Items

Normative survey items produced near unanimous responses. Students overwhelmingly supported student body racial diversity. Eighty-nine percent of students (N = 178)¹⁷¹ agreed with the statement, "UCLA Law should have a racially diversity student body." Only 4% of students affirmatively disagreed with this statement. An even greater majority of students reported that the administration has an ethical responsibility to respond to incidents that make students feel disrespected or unwelcome because of their race. Specifically, 92% of students agreed with the statement, "The UCLA Law administration has an ethical responsibility to respond to these types of incidents when they are made aware of them." In this survey item, "these types of incidents" refers to a series of preceding survey items that asked students to state whether the behavior of another student, professor or administrator had caused them to feel "unwelcome or disrespected because of my race."

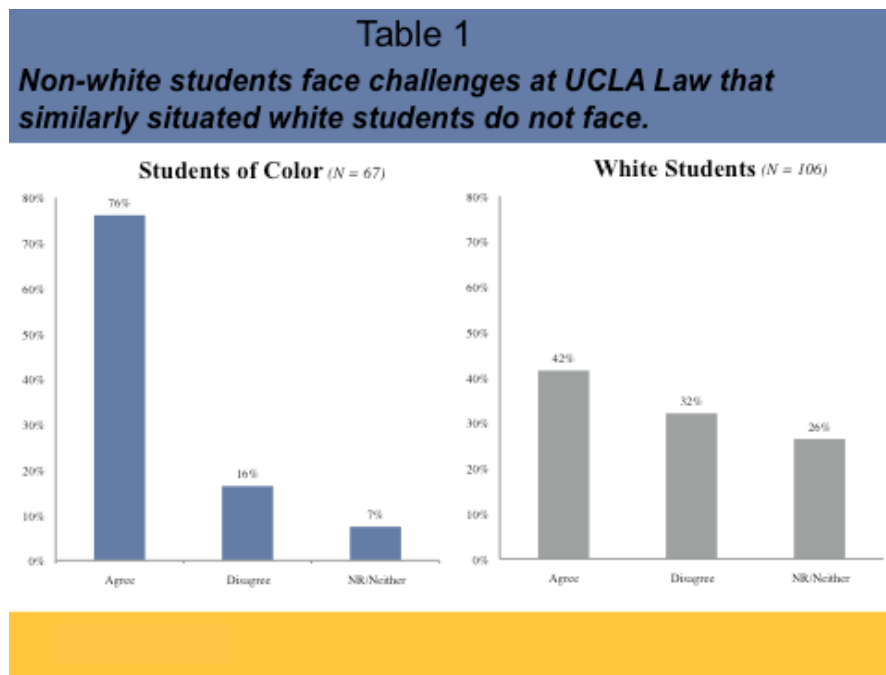
2. Perception Survey Items – Campus Racial Climate

Survey items concerning campus racial climate and racial and gender unevenness revealed significant divergence along racial and gender lines. Women and Students of Color were far more likely than men and White students to perceive UCLA Law as a racially and gender-hostile environment. Seventy-four percent of White students (N = 106) described UCLA Law's classroom environment as always or mostly welcoming to students regardless of race. Only 24% of White students described the classroom environment as

171. N refers to the number of students in a particular category who responded to the particular survey item. Subsequent percentages thus refer to the population defined by N.

sometimes or never welcoming to students regardless of race. In contrast, 49% of Students of Color (N = 67) described the classroom environment as always or mostly welcoming regardless of race. An equal 49% of Students of Color responded that the environment is sometimes or never welcoming to students regardless of race.

Women and Students of Color were also more likely than their male and White colleagues to perceive racial unevenness at UCLA Law. Seventy-six percent of Students of Color (N = 67) agreed that “Non-White students face challenges at UCLA Law that similarly situated White students do not face” (see table 1). Only 16% of Students of Color disagreed with this statement. In contrast, 42% of White students (N = 106) agreed with the statement, and 32% disagreed. Moreover, responses cross-tabbed by gender revealed a similar distribution. Among women (N = 78), 63% agreed with the statement, while 18% disagreed. Among men (N = 98), 47% agreed with the statement and 35% disagreed.



Students' perceptions regarding the engagement of race in first-year courses revealed a similar racial and gender divergence. Among Students of Color (N = 67) and women (N = 78), only 21% of respondents agreed that professors who teach first year students actively recognize and promote open discussions about race in first-year courses. Sixty six percent of Students of Color and 62% of women disagreed. In contrast, 42% of White students (N =

106) and 45% of men (N = 98) agreed with the statement. Forty percent of White students and men disagreed.

Women and Students of Color were more likely than their male and White counterparts to perceive gender unevenness at UCLA Law. Sixty-three percent of women (N= 78) agreed that “Female students face challenges at UCLA Law that similarly situated male students do not face.” Only 22% of women disagreed with this statement. In contrast, 36% of men (N = 98) agreed with the statement. Forty five percent of men disagreed. Moreover, responses correlating with race closely tracked correlations with gender. Among Students of Color (N = 67), 64% agreed with the statement and only 22% disagreed. Among White students (N = 106), 39% agreed with the statement and 42% disagreed.

Women and Students of Color were more likely than their male and White counterparts to perceive sexual-orientation unevenness at UCLA Law. Forty-six percent of women (N= 78) agreed that “LGBT students face challenges at UCLA Law that similarly situated straight students do not face.” Only 17% of women disagreed with this statement. In contrast, 28% of men (N = 98) agreed with the statement. Forty-four percent disagreed. Again, correlations with race closely tracked correlations with gender. Among Students of Color (N = 67), 40% agreed with the statement, while only 22% disagreed. Among White students (N = 106), 34% agreed with the statement, while 37% disagreed.

3. *Perception Survey Items - Student and Faculty Diversity*

A student’s race impacts the way in which that student perceives racial diversity in the law school. Among Students of Color (N = 67), only 28% agreed with the statement, “UCLA Law has a racially diverse student body.” Forty-one percent of Students of Color disagreed with the same statement. In a near opposite split, 43% of White students (N = 106) agreed that “UCLA Law has a racially diverse student body,” while 27% of White students disagreed with this statement.

Cross-tabbing by race also revealed students’ divergent perceptions about faculty racial diversity. Only 22% of Students of Color (N = 67) agreed with the statement, “UCLA Law has a racially diverse faculty.” Fifty-eight percent of Students of Color disagreed with this statement. In contrast, White students (N = 106) were evenly split, with 35% selecting, “UCLA Law has a racially diverse faculty,” and 35% selecting, “UCLA Law does not have a racially diverse faculty.”

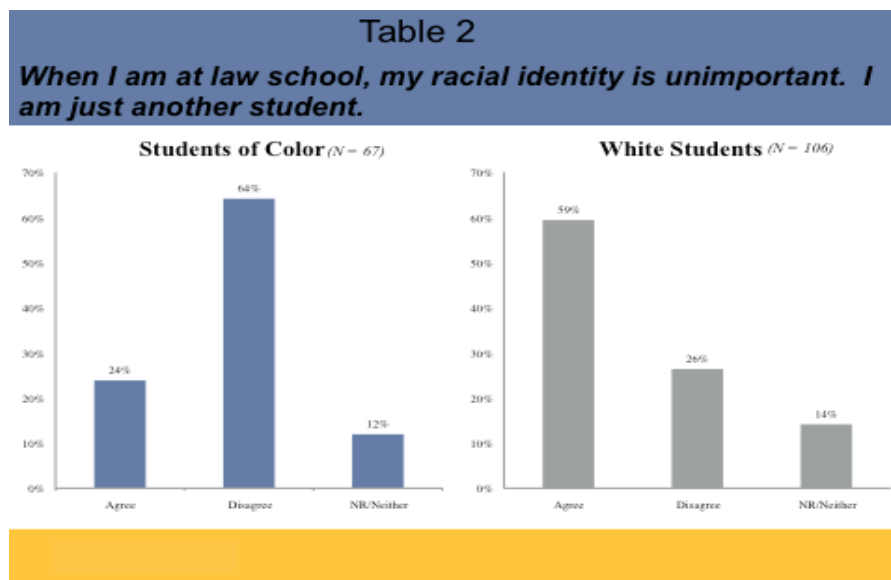
Interestingly, even though responses revealed divergent student perceptions about the Law School’s racial composition, Students of Color and White students revealed similar perceptions about the administration’s commitment to racial diversity in the law school. A slight majority of Students of Color (55%, N = 67) and White students (58%, N = 106) agreed that a

racially diverse student body is a priority of the administration. One notable divergence is that 36% of Students of Color disagreed with this statement, in comparison to only 18% of White students.

Students' perceptions regarding the administration's commitment to faculty racial diversity tracked this convergence. Both Students of Color and White students expressed a lack of faith in the administration's commitment to a racially diverse faculty. Only 31% of Students of Color ($N = 67$) and just over 40% of White students ($N = 106$) agreed that "a racially diverse faculty is a high priority of the UCLA Law administration." Again, Students of Color were far more likely than White students to affirmatively disagree with this statement. In comparison to 24% of White students, 49% of Students of Color disagreed with the statement that "faculty racial diversity is a high priority of the UCLA Law administration."

4. Description Survey Items

To determine whether students felt their race was relevant at UCLA Law, the DAC Survey asked students to agree or disagree with the following statement: "When I am at law school, my racial identity is unimportant. I am just another student." Responses revealed that a student's race significantly impacts the likelihood that the student is consciously aware of her race and views her racial identity as relevant at UCLA Law (see Table 2). Students of Color and White students responded with diametrically opposed views. Only 24% of Students of Color ($N = 67$) agreed with the statement, while 64% of Students of Color disagreed. In a near flip, 59% of White students ($N = 106$) agreed with the statement, while only 26% disagreed.



Among Students of Color, responses to this survey item revealed divergences among Asian American, Latina/o and Black students.¹⁷² As the aggregate responses suggest, Asian American, Latina/o and Black students disagreed with the statement in Table 2 at a rate far greater than White students. However, the results from this sample reveal noteworthy divergence (at least among the individual respondents) among the three racial groups. At 62%, Asian American respondents (N = 21) were least likely to disagree with the statement that their racial identity was unimportant while at law school. Seventy-seven percent of Latina/o respondents (N = 13) disagreed with the statement. Ninety-percent of Black respondents (N = 10) disagreed.

The DAC Survey also included a series of questions that inquired into whether another student's, faculty member's, or administrator's behavior made respondents feel unwelcome or disrespected because of their race. Responses indicated that, depending on the perpetrator of the incident (student, faculty, member or administrator), Students of Color were between 3 to 8 times more likely than White students to experience an incident that made them feel unwelcome or disrespected because of their race.

Twenty-five percent of all respondents (N = 178) reported experiencing an incident in which another student's behavior made them feel unwelcome or disrespected because of their race. Forty-three percent of Students of Color (N = 67) reported such an incident, in comparison to only 13% of White students (N = 106) (ratio of 3.31:1). Disaggregating by race revealed that 38% of Asian American students (N = 21) experienced such an incident. While more common than White students' experiences, Asian American students were less likely to experience such an incident than Latina/o (62%, N = 13) and Black (60%, N = 10) students.

Additionally, seventeen percent of all respondents (N = 178) reported feeling unwelcome or disrespected as a result of a faculty member's behavior. Cross-tabbing by race revealed that 33% of Students of Color reported experiencing such an incident, and only 8% of White students reported such an incident (ratio of 4.13:1) (see Table 3). Disaggregating Students of Color into individual racial groups revealed that 30% of Asian American students (N = 27) experienced such an incident. Though more common than White students' experiences, Asian American students were less likely to experience such an incident than Latina/o (31%, N = 13) and Black (64%, N = 11) students.

172. Due to the small sample size, there may be a legitimate concern about generalizing these findings across all Asian American students, Latino/a students, and Black students at the law school. Although we recognize this concern, the data is meaningful regardless of generalizability and thus worth including in this report. Additionally, these disaggregations are included in order to mark points of divergence that suggest the need for further research.

While at UCLA Law, as a result of the behavior of a professor in class, I have felt unwelcome or disrespected because of my race.

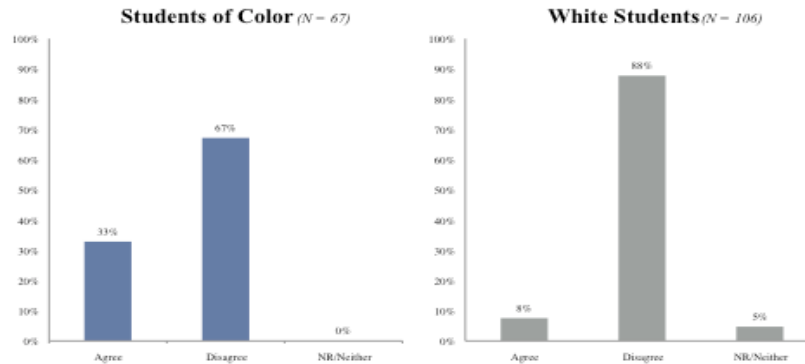


Table 3

With respect to administrators, only 10% of students reported experiencing such an incident. Notwithstanding this relatively lower rate, the ratio between Students of Color and White students increased. While 22% of Students of Color reported such an incident, only 3% of White students experienced feeling unwelcome or disrespected as a result of an administrator's behavior (ratio 7.33:1). Disaggregating by race revealed that 19% of Asian American students (N = 27) experienced such an incident. Though more common than White students' experiences, Asian American students were less likely to experience such an incident than Latina/o (23%, N = 13) and Black (36%, N = 11) students.

Beyond gross and relative differences in students' experiences with racially hostile incidents, survey responses revealed that these incidents had a more severe impact on Students of Color. Among students who experienced one of the aforementioned incidents, Students of Color (N = 32) thought about the event longer than White students (N = 15). Sixty-three percent of Students of Color reported thinking about the incident(s) for multiple days and 31% reported thinking about the incident(s) for a month or more. In contrast, 53% of White students thought about the incident for one day or less. And, 33% of White students reported thinking about the incident for multiple days, while only 8% reported thinking about the event for a month or more.

To further analyze the impact of such incidents, the DAC Survey utilized a 10-point scale (1/"Not at all" to 10/"Severely") to measure severity along five axes: (1) interference with ability to study for class; (2) detraction from ability and desire to learn; (3) reduction in class participation; (4) production of emotional distress, embarrassment, or shame; and, (5) creation of student doubt

in UCLA Law's commitment to equal treatment for all students. Constant across every measure, incidents had a greater impact on Students of Color.

(1) Degree to which the incident interfered with the student's ability to study for class.

Incidents were far less likely to interfere with a White student's ability to study for class than a Student of Color's ability to study for class. Of the 16 White respondents, 50% reported that the incident had no effect at all, and 94% rated the effect between 1-3 on the severity scale. The mean for White respondents was 1.9. In contrast, responses from Students of Color (N = 34) produced a near uniform distribution across the severity scale, with an overall mean of 5.6. Twenty-six percent of Students of Color described an incident as a 1-3 on the severity scale, 47% rated incidents between 4-7, and 26% scored an incident between 8-10.

How greatly did this incident interfere with your ability to study for class?

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	<u>Total</u>	<u>Mean</u>
SoC	2	4	3	2	6	4	4	4	2	3	34	5.6
White	8	5	2	0	0	0	1	0	0	0	16	1.9

(2) Degree to which the incident(s) detracted from the student's ability and desire to learn.

White students who experienced such an incident were far less likely than Students of Color to report they suffered a diminished ability and desire to learn. Among White respondents (N = 16), 75% reported that the incident affected their desire to learn "Not at all," and 94% of White students reported that the event was at most a 3 in severity. The mean score for White respondents was 1.7. In contrast, responses of Students of Color (N = 34) revealed a relatively uniform distribution across the severity scale and a mean of 4.9. Thirty-five percent of Students of Color indicated incidents were a 1-3 on the scale, 35% scored incidents between 4-7, and 29% rated incidents between 8-10.

How greatly did this incident(s) detract from your ability and desire to learn?

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	<u>Total</u>	<u>Mean</u>
SoC	4	5	3	4	3	5	0	4	4	2	34	4.9
White	12	2	1	0	0	0	0	1	0	0	16	1.7

(3) *Degree to which the incident(s) caused the student to participate less in class.*

Although incidents caused all students to participate less in class, the effect was far more severe on Students of Color. Of the 16 White respondents, 63% reported a severity score of 1-3. Unlike in previous severity inquiries, multiple White students reported scores greater than 5 on the severity scale, with an overall mean of 3.7 (median = 2). This relative increase in severity appeared in Students of Color's responses as well. Sixty-seven percent of Students of Color (N = 34) reported a score greater than 5 on the severity scale, with an overall mean of 6.8. Perhaps most notable, 32% of Students of Color reported a 10 on the severity scale.

How greatly did this incident(s) cause you to participate less in class?

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	<u>Total</u>	<u>Mean</u>
SoC	3	0	5	3	0	2	3	3	3	11	33	6.8
White	7	2	1	0	1	1	2	0	0	2	16	3.7

(4) *Degree to which the incident(s) caused the student to feel emotional distress, embarrassment or shame?*

Nearly paralleling the previous item on class participation, responses revealed that incidents disproportionately impacted the emotional and psychological well-being of Students of Color. Seventy-five percent of White respondents (N = 16) reported a severity score of 1-3, and 12% described incidents as a 10. The mean for White respondents was 3.3 (median = 2). In contrast, 60% of Students of Color (N = 34) reported a score between 7-10, with an overall mean of 6.3 (median = 7).

How greatly did this incident(s) cause you to feel emotional distress, embarrassment or shame?

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	<u>Total</u>	<u>Mean</u>
SoC	2	3	3	1	2	3	8	3	5	4	34	6.3
White	6	5	1	0	1	0	0	1	0	2	16	3.3

(5) *Degree to which the incident caused the student to doubt UCLA Law's commitment to equal treatment for all students.*

A student's race correlated with the degree to which the incident impacted her perception of the administration's commitment to equal treatment. Sixty percent of White students (N = 15) reported that the incident had little to no impact on their perception of the administration. The overall mean for White respondents was 3.9 (median = 3). In contrast, only 9% of Students of Color (N = 33) reported that the incident had little or no impact. Fifty-nine percent of Students of Color reported a score between 8-10, with an overall mean of 7.3 (median = 8).

How greatly did this incident(s) cause you to doubt UCLA Law's commitment to equal treatment for all students?

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	<u>Total</u>	<u>Mean</u>
SoC	1	2	1	2	3	2	2	5	7	8	33	7.3
White	5	2	2	1	1	0	1	1	0	2	15	3.9

5. *Qualitative Responses.*¹⁷³

In addition to quantitative survey items, the DAC Survey concluded with a survey item that allowed students to provide open-ended responses. Fifty respondents provided a qualitative response. The qualitative responses reflect that same perceptive divergence that appeared throughout the quantitative portion of the survey. Illustrative of this perceptive divergence, the majority of responses either explicitly emphasized or expressly denied the existence of racial unevenness at UCLA Law.

(1) *Discussion*

Findings from the DAC Survey are consistent with twenty years of research on campus racial climate.¹⁷⁴ Perhaps most notable is the degree to which perceptions about existing diversity, racial unevenness, and classroom climate sharply diverged along racial lines. Paralleling past studies in the undergraduate context, Students of Color at UCLA Law were far more likely than their White colleagues to perceive UCLA Law as a racially hostile environment. Students of Color experienced far greater levels of stigma consciousness¹⁷⁵ than their White colleagues. Unlike the majority of Students

173. Qualitative responses on file with Author.

174. See *supra* Part I.B.ii (discussing campus racial climate, racial microaggressions and stereotype threat).

175. As expressed through students' perception that their race was relevant in the law school setting.

of Color who feel marked by their racial identity, the survey revealed that White UCLA Law students overwhelmingly proceed through law school without ever consciously thinking about their own whiteness.¹⁷⁶

As anticipated, levels of stigma consciousness diverged among non-White racial groups. Although generalizing across the student body may be difficult due to the small sample size, clear divergence existed among actual respondents. Asian-American students demonstrated a larger stigma consciousness than White students; however, they reported a lower level of stigma consciousness than Latina/o and Black students. Further research is recommended in order to obtain a more robust sense of the differing levels of stigma consciousness across racial groups.

Students of Color were more likely than their White colleagues to perceive the law school as lacking student body racial diversity. There are at least two possible explanations for this result. Students of Color might enter law school with a different baseline regarding what constitutes racial diversity. In other words, Students of Color and White students may not diverge in their perception of actual numbers of bodies, but rather diverge in their definition of racial diversity. Alternatively, race may dictate the way in which students perceive the relative number of White and nonwhite bodies in the law school.

One unexpected observation was the degree to which the perception of women tracked that of Students of Color. In nearly every perception item, responses from women and Students of Color tracked closely together. This result prompted the belief that women of Color may have been overrepresented in the respondent pool, thus skewing results. Subsequent analysis of the respondent pool revealed that this was not the case. This finding suggests that the responses of White women and White men consistently diverged. A potential explanation for this divergence is that White women, though they do not experience racial unevenness, are more likely to have dealt with gender unevenness in their own lives. This personal experience may make White women more likely to appreciate racial unevenness, even if they do not personally experience it.

Beyond perception, the DAC Survey revealed that the campus racial climate at UCLA Law exacts a disproportionately severe toll on Students of Color. These findings provide support for the claim that Students of Color at UCLA Law do not travel down the same river or run on the same track as their White counterparts. Rather, their route is packed with a variety of race-dependent obstacles. Disaggregating non-White racial groups revealed that routes differ even among Students of Color. Although the sample size was small, existing responses suggest that Black and Latino students are forced to

176. Such moments are most likely to occur when race is explicitly discussed; when whiteness is put on notice.

traverse the most difficult route at UCLA Law. We suggest further research to determine the more generalizable validity of this initial finding.

Overall, the findings conclusively show that racial unevenness exists at UCLA Law. Not only are Students of Color more likely than White students to perceive a negative racial climate, they are also far more likely to be victims of a racially hostile incident. The effects of such incidents are far more severe for Students of Color. Although these findings may paint a negative image of campus racial climate, it should not be forgotten that students expressed near universal support for racial diversity and administrative responses to incidents that make students feel unwelcome or disrespected because of race.

CONCLUSION

The DAC Survey provides a new dimension to previous research on racial unevenness in higher education. With a focus on the campus racial climate at UCLA Law, the DAC Survey reveals that hostile classroom climate is not limited to the undergraduate level. Racial unevenness and its concomitant burdens are a reality for Students of Color at UCLA Law. We should understand, however, that UCLA Law is likely far from unique in this regard. Similar to the undergraduate level, there is reason to believe that racial unevenness is endemic across law schools.

The DAC Survey's unambiguous results should be sufficient to warrant an institutional response. In order to prove an intervention to prove successful, the prescription must track the diagnosis. Thus, having diagnosed the problem as a racially hostile environment and an unequal learning environment, the response must focus on broad, institutional change. Four recommendations are provided.¹⁷⁷

(1) Engage in robust institutional learning.¹⁷⁸ As with any other study, the DAC Survey can only tell us so much. Even as a limited device, the DAC Survey provided a wealth of information about student experience at UCLA Law. We have learned that Students of Color experience law school in ways fundamentally different than their White colleagues. This information is now available to guide institutional decision-making in the realm of classroom climate and learning environment. However, the DAC Survey only scratched the surface. It is thus recommended that tools capable of producing

177. These recommendations are framed with respect to UCLA Law because the DAC Survey was administered at UCLA Law. However, the recommendations are in no way unique to one law school. Although the characteristics of each law school will dictate the precise contours of any particular intervention, we believe that these four recommendations should translate to most law schools in the country.

178. See generally Georgia L. Bauman, *Promoting Organizational Learning in Higher Education to Achieve Equity in Educational Outcomes*, in NEW DIRECTIONS FOR HIGHER EDUCATION 22-35 (Adrianna Kezar, 2005) (arguing that enhanced institutional learning is a key component to the positive development of any institution of higher education).

organizational learning, such as the DAC Survey and similar instruments, become permanent fixtures at UCLA Law.

(2) Hire more faculty members interested in supporting student well-being and improving racial classroom climate. Currently, only a small selection of staff and faculty at UCLA Law engage in a form of informal mentoring that helps students navigate the racial unevenness of law school. This mentoring, which serves an essential institutional function by combating the emotional and psychological harms flowing from racial unevenness, goes largely unrecognized and uncompensated by the institution.

To avoid concerns about formalizing new responsibilities, institutions should reconceptualize notions of merit in the faculty hiring process to encompass this “mentor” characteristic. By focusing on a candidate’s ability to “mentor” students, institutions need not worry about the hiring criterion taking on a race-conscious dimension.¹⁷⁹ Although it is possible that a larger percentage of prospective Faculty of Color would exhibit interest or ability to serve such a function, race need not be a prerequisite. Thus, public institutions such as UCLA Law should not hesitate for the fear of engaging in a potentially prohibited form of race-consciousness.

(3) Admit more Students of Color. As the literature revealed, numerical underrepresentation plays a role in the manifestation and maintenance of racially hostile environments. Increasing the number of Students of Color will improve the learning environment. Some may disregard this recommendation as a naïve desire to circumvent prohibitions against race-conscious admissions. There are many arguments why admissions offices should reduce reliance of the LSAT; however, increasing the number of Student of Color admits does not necessitate rejecting the current practice. Growing evidence that the LSAT undermeasures the talent of negatively stereotyped groups provides a compelling argument that our current admissions system is far from race-neutral.¹⁸⁰ Thus, instead of eliminating any reliance on the LSAT, Admissions offices or the Law School Admission Council (LSAC) should begin correcting for this mismeasurement, which effectively exacts a race-conscious harm on deserving and talented Black and Latina/o students.

179. It is arguable that faculty hiring criteria should become race-conscious in a variety of ways. See, e.g., Kang, *Fair Measures*, *supra* note 1 (explaining that faculty of color may serve the role of debiasing agents); cf. Kennedy, *supra* note 24. Recognizing a “mentor” orientation as a component of merit need not be race-conscious. However, it should be noted that in places where informal mentoring occurs, the majority of individuals providing this support are often People of Color.

180. See Feingold, *supra* note 1 (arguing that law schools should rescale LSAT scores so as to avoid under measuring the talent of Black and Latina/o students); Walton et al., *supra* note 1 (reviewing a wealth of data supporting the notion that the LSAT under measures the talent of negatively stereotyped groups such as Black and Latina/o law school applicants).

(4) Change the internal conversation. We must stop asking what is wrong with our students. Constant retreat to this notion misreads the ailment and reinforces negative stereotypes about Students of Color in our institutions. Instead of citing students as the source of the problem, we must refocus our attention on the failings of our educational institutions. Our inability to create learning environments that allow all students to compete on the same track is a powerful impediment to realizing healthy racial campus climates.

We believe that concerted efforts to realize any of these recommendations will produce tangible benefits within any institution. As always, the ability to identify the correct prescription and actually implement it is always easier said than done. Still, the challenge should not prevent us from taking steps to realize the goal of producing educational institutions that treat all of our students equally.